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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-498

In the Matter of

Louisiana Region Public
Safety Plan

ORDER

Adopted: December 19, 1990; Released: December 31, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On July 20, 1990, Region 18 (Louisiana) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region. On October 2, 1990, Louisiana filed revisions to the plan, based on conversations with the Commission's staff.

2. The Louisiana Plan was placed on Public Notice for comments 55 FR 43033 (Oct. 25, 1990). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Louisiana and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Louisiana.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Louisiana IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Louisiana may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-600

In the Matter of

Competition, Rate Deregulation
and the Commission's Policies
Relating to the Provision of
Cable Television Service

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1990; Released: December 31, 1990

By the Commission:

1. On July 31, 1990, the Commission released and submitted to Congress a *Report* in the above-captioned proceeding. The *Report* examined issues concerning rate regulation and competition in the cable television industry and offered related legislative recommendations. The Commission prepared and submitted the *Report* pursuant to Section 623(h) of the Cable Communications Policy Act of 1984, which required this submission not later than six years after the enactment of the Cable Act -- by October 28, 1990.[1]

2. The Wireless Cable Association, Inc. ("WCA"), has submitted a petition for limited reconsideration of that *Report*. Although WCA does not dispute any of our factual findings, it requests the modification of certain legislative recommendations contained in the *Report*. Specifically, WCA argues, as it previously had done in comments filed in this proceeding, that legislation should be recommended providing alternative multichannel video service providers with access to programming services regardless of whether cable operators have cognizable interests in these services. Because the recommendations in the *Report* are not Commission actions against which reconsideration lies, we are dismissing WCA's petition.

3. Petitions for reconsideration are governed by Section 405 of the Communications Act of 1934.[2] The *Report* in this proceeding sets forth the results of the Commission's factual assessment of the cable industry and makes legislative recommendations to Congress based on this assessment. Congress may adopt, reject or modify these legislative recommendations. The *Report* does not bind any party or person to a particular course of action, [3] nor does it alter the Commission's rules or policies in any manner.[4] Recommendations of the type contained in the *Report* do not constitute the type of "order, decision, report, or action" to which Section 405 applies, and thus the *Report* does not constitute a Commission action against which reconsideration lies.

4. Further, the time for submission of the subject *Report* has now passed, and, as a practical matter, the *Report* itself has already been subject to review as part of the legislative process.[5] In that process, the WCA arguments have also been specifically reviewed and considered. In light of these factors, we do not find further consideration of the matters raised by WCA to be either necessary or appropriate at this time.

5. Accordingly, IT IS ORDERED that the petition for limited reconsideration filed by the Wireless Cable Association, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. § 543(h).

[2] Section 405(a) states:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration . . . .

47 U.S.C. § 405; *see also* 47 C.F.R. § 1.106 (Commission rule implementing Section 405).

[3] *Cf. Public Utilities Commission of the State of California*, 4 RR 2d 498, 501 (1965) (dismissing petition for rehearing of public notice announcing submission of tariff filings), *aff'd, Public Utilities Commission of the State of California v. US and FCC*, 356 F.2d 236 (9th Cir. 1966), *cert. denied*, 385 U.S. 816 (1966).

[4] *Cf. Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd 930, 936 n.18 (1987) (holding that under Commission Rule 1.106, a public notice summarizing enforcement standards reflected in other declaratory rulings has no independent legal significance and is therefore not a final action against which reconsideration lies), *remanded in part on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[5] *See, e.g.*, H.R. Rep. No. 682, 101st Cong., 2d Sess. 102-106 (Sept. 6, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-540

In re Applications of

MOUNTAIN-HIGH BROADCASTERS, INC. (hereafter "Broadcasters")	File No. BPH-890426MH
CHARISMA RADIO CORP. (hereafter "Charisma")	File No. BPH-890504MA
BENCHMARK COMMUNICATIONS CORPORATION (hereafter "Benchmark")	File No. BPH-890504ME

For Construction Permit
for a New FM Station on Channel 283A
in Highlands, North Carolina

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 2, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Benchmark*. Information before us indicates apparent misrepresentations by Benchmark to the Commission. Specifically, on March 25, 1988, Benchmark filed an application for extension of time to construct Station WCCJ(FM) at Chatom, Alabama. In a *Letter to Benchmark Communications Corporation from Larry D. Eads*, 8920-MW (January 19, 1989), Benchmark's request for extension of its construction permit was denied. Mr. Eads, Chief, Audio Services Division stated, in pertinent part:

> We must also point out, however, that there appear to be several misrepresentations with respect to construction progress made by Benchmark in this case. Specifically, while Benchmark claimed in its March 25 application that tower and mobile home to be used for studios and offices were on site with equipment installation progressing, these statements appear to be untrue. There is still no tower at the site, and no trailer arrived at least until (by Benchmark's own admission) May 16, 1988. Additionally, Benchmark claimed that the power company had begun installing a service line to the site, when no such line was in place yet, over nine months after the claim was made. We remind Benchmark that truthfulness is a key element of character necessary to operate a broadcast station in the public interest. *See In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986); *recon. granted in part*, 1 FCC Rcd 421 (1986). *See also FCC v. WOKO*, 329 U.S. 223 (1946), and *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980). However, given the denial of the subject extension application and consequent cancellation of the WCCJ(FM) construction permit, we do not believe that further action is warranted at this time.

Accordingly, an appropriate issue will be specified in this proceeding.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. (a) To determine in connection with the matters discussed in paragraph two, above, whether Benchmark made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission;
>
> (b) To determine, in light of the evidence adduced pursuant to issue (a) above, whether Benchmark possesses the basic qualifications to be a Commission licensee.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch,

Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Rule Making to Modify Commission Policies Established in CC Docket No. 84-1299 Relating to Separate Satellite Systems, Including the Prohibition on Carrying Traffic Interconnected With the Public Switched Message Network — RM 7562

ORDER EXTENDING COMMENT PERIOD

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, International Facilities Division:

1. On December 3, 1990 the Commission issued a public notice of a petition for Rule Making in the above-captioned matter filed by Pan American Satellite (PAS). On December 5, 1990, the Commission issued a "corrected" public notice which specified that interested parties have 30 days within which to respond.

2. On December 18, 1990, Columbia Communications Corporation (Columbia) filed a motion requesting an extension of time until January 31, 1991 for the submission of comments in the above-referenced petition for Rule Making. Columbia states that the issues raised in PAS's petition are of fundamental importance to the U.S. separate international satellite industry and that interested parties need more than 30 days within which to gather relevant data and to prepare their responses. In addition, Columbia believes that an extension is merited since the principles of many interested parties will be unavailable for consultation during the two weeks immediately preceding the current filing date due to the Christmas and New Year holidays. Columbia also notes that a grant of the requested extension of time would clear up the confusion that has arisen as to whether the current deadline is 30 days from December 3, 1990 or December 5, 1990.

3. Extensions of time are not routinely granted and the proximity of a filing date to a holiday is generally not a sufficient reason for an extension. *See* 47 C.F.R. §1.46(a). In this case, we agree with Columbia that the issues involved are of such magnitude that the current deadline might not afford interested parties sufficient time. The issues presented in PAS's petition are not only of importance to the separate satellite industry, but affect the future of the entire international satellite industry. The fact that the Christmas and New Year holidays coincide with the current filing deadline further lessens the likelihood that interested parties could adequately address the issues presented. We therefore find good cause to grant the requested extension of time.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 1.46(b) of the Commission's Rules and Regulations, 47 C.F.R. §1.46(b), that all interested parties will have until January 31, 1991 to file comments and until February 15, 1991 to file reply comments in the above- captioned matter.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-480

In the Matter of

Amendment of Parts 13 and 80 of the Commission's Rules to implement the Global Maritime Distress and Safety System (GMDSS) to improve the safety of life at sea.

ORDER

Adopted: December 24, 1990; Released: December 26, 1990

By the Chief, Private Radio Bureau:

1. On October 25, 1990, the Commission released a *Notice of Proposed Rule Making* (*Notice*) [1] proposing to implement the Global Maritime Distress and Safety System (GMDSS) in the Commission's Rules.[2] This proceeding proposes to incorporate the Final Acts of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on the Global Maritime Distress and Safety System, London, 1988, (1988 IMO Conference) into the Commission's Rules. It also completes the series of proceedings implementing the Final Acts of the 1987 World Administrative Radio Conference (WARC) for Mobile Services, Geneva, 1987 (1987 Mobile WARC). The proposed rules would apply to all cargo ships of 300 gross tons and over that navigate internationally or in the open sea and all passenger ships that carry more than twelve passengers regardless of size and navigate internationally or in the open sea, *i.e.*, ships subject to either the Safety of Life at Sea (SOLAS) Convention or Title III, Part II of the Communications Act of 1934, as amended (Communication Act). The due dates for comments and reply comments are January 7, 1991, and February 6, 1991, respectively.

2. Subsequent to the release of the *Notice*, the U.S. Coast Guard (USCG) and the Radio Technical Commission for Maritime Services (RTCM) filed separate requests for an extension of time for filing comments and reply comments to June 7, 1991, and July 6, 1991, respectively. American Mobile Satellite Corporation (AMSC) filed a letter supporting the extension of time requested by the USCG. Additionally, the Radio Electronics Officers Union in conjunction with the American Radio Association and on behalf of the AFL-CIO Maritime Committee (hereinafter, ROU) requested to extend the comment and reply comment dates to September 9, 1991, and October 14, 1991, respectively.

3. In its request, the USCG indicates that in view of the significant changes proposed, additional time is necessary to review the proposals and prepare well documented pleadings in response to the *Notice*. [3] RTCM, a non-profit organization concerned with maritime matters, notes that the issues raised in the *Notice* will impact " . . . all elements of the maritime telecommunications community including sales and service dealers, manufacturers, common carriers and other service providers, governmental authorities concerned with maritime safety at sea, and operators of ships of all sizes -- whether or not they are directly subject to mandatory carriage of GMDSS equipment and/or systems."[4] It indicates that the extension of time would allow it to coordinate effectively the diversity of views and prepare meaningful recommendations.[5]

4. ROU, on behalf of organizations representing radio officers and workers in the maritime trade and allied fields, states that it does not have the personnel available with the required technical and practical expertise to provide valued comments within the current time period for comments.[6] It notes that the unions expect to complete a survey in 4-5 months regarding on-board maintenance requirements for vessels operating in "Desert Shield."[7] Both RTCM and ROU argue that there is no logical reason to mandate severe time restrictions for comments and reply comments. They note that the earliest date, February 1, 1992, is for voluntary compliance with the GMDSS provisions. They argue that the mandatory compliance dates of February 1, 1995, for new ships and February 1, 1999, for all ships, provides sufficient time to address fully the complex technical matters regarding implementation of the GMDSS in the United States. Finally, RTCM and ROU note that domestic regulations regarding the GMDSS are constrained by existing provisions contained in the Communications Act.[8] They argue that because changes to the Communications Act are not imminent, a delay in the comment period is reasonable.[9]

5. We have carefully considered the requests for an extension of time and their supporting arguments. We conclude that a reasonable delay to June 7 and July 6, 1991, for comments and reply comments, respectively, is appropriate. We agree that the amendments set forth in the *Notice* are significant and represent sweeping technical changes to the present distress and safety system for the maritime community. We find, however, an extension of the comment and repiy comment period to September 9 and October 14, 1991, respectively, as requested by ROU is excessive. This additional time would extend the comment and reply comment period to almost 12 months from the release of the *Notice*. Although implementation of the GMDSS on a voluntary basis will be impaired if changes in the Communications Act are not made, we continue to believe that concluding this proceeding within a reasonable time frame will provide the maritime community the necessary advance notice concerning the new GMDSS requirements. We must ensure sufficient time for U.S. ship owners to plan for the implementation of the GMDSS while permitting an adequate time for the views of the maritime community to be developed. Consequently, we believe that a 5 month extention to the comment and reply comment dates strikes the appropriate balance. No further extensions are contemplated.

6. In view of the foregoing, IT IS ORDERED that the requests of the USCG and RTCM for an extension of time to file comments and reply comments to June 7 and July 6, 1991, respectively, IS GRANTED.

7. IT IS FURTHER ORDERED that ROU's request to extend the comment and reply comment period to September 9 and October 14, 1991, IS DENIED.

8. IT IS FURTHER ORDERED that the period for filing comments and reply comments in the above-captioned proceeding is extended to and includes June 7, 1991, and July 6, 1991, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 5 FCC Rcd 6212 (1990).

[2] The GMDSS will change international distress communications from Morse code and manual operation to automated, or semi-automated, communications using satellite and digital technologies. By incorporating advanced communications techniques and using ship-to-shore communications links, the GMDSS will significantly improve the safety of life and property at sea throughout the world. These changes will affect ship and coast station equipment and operations worldwide. Internationally, the GMDSS will be phased in from 1992 to 1999.

[3] USCG at 1.

[4] RTCM at 2.

[5] RTCM at 4.

[6] ROU at 2.

[7] ROU at 3.

[8] In the *Notice*, we stated that newly constructed or existing vessels that wish to install the GMDSS equipment as of February 1, 1992, would be required to carry dual sets of equipment and Morse code radiotelegraph operators if the Communications Act is not amended. Thus, we expect few owners to fit their ships voluntarily unless the Communications Act is amended since incurring the cost of operating two systems would place U.S. ships at a competitive disadvantage. *Notice* at para. 43.

[9] RTCM at 4-5 and ROU at 3-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TS Infosystems, Inc. FOIA Control No. 90-03
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1990; Released: January 2, 1991

By the Commission:

1. The Commission has before it an Application for Review filed on behalf of TS Infosystems, Inc. (Infosystems), appealing an August 3, 1990 Freedom of Information Act (FOIA)[1] decision by the Chief, Operations Support Division, Office of Managing Director (OMD). Infosystems seeks review of the OMD's withholding of certain materials concerning Request for Proposal (RFP) No. 90-03, issued by the Commission on February 1, 1990.

BACKGROUND

2. The RFP sought offers for the award of a contract to install and maintain photocopy and microfilm reader and printer equipment, and provide for the search, retrieval, and duplication of Commission documents. On July 6, 1990, the Commission awarded the contract to Downtown Copy Center (DCC or awardee).[2] Infosystems, an unsuccessful bidder in the procurement action, then filed the subject FOIA request. Among other things, [3] Infosystems sought access to the technical scores, evaluated prices, and relative ranking for all of the bidders in RFP 90-03. Infosystems also requested a copy of the awarded contract and the awardee's price listing and proposal.

3. The OMD denied access to this information under the deliberative process privilege embodied in Exemption 5 of the FOIA.[4] On appeal, Infosystems challenges the applicability of Exemption 5 of the FOIA. It argues that the information requested should be released because it is factual in nature and does not reveal the agency's deliberative process.

DISCUSSION

4. We agree with the OMD's determination that the records containing the technical scores and relative rankings for all of the bidders are protected under Exemption 5 of the FOIA. Those records were developed by the technical and cost evaluation teams established for the underlying procurement action. Like any other procurement activity, the evaluation teams did not have independent decisionmaking authority. Instead, the teams acted in an advisory capacity to the Commission's contracting officer, who was responsible for selecting the successful bidder. Moreover, while the information requested is numerical, it nonetheless reflects opinions and recommendations from the members of the evaluation teams to the contracting officer. Thus, the information developed by the evaluation teams is both predecisional and deliberative, and therefore within the scope of Exemption 5. *See SMS Data Products Group, Inc. v. Department of the Air Force*, Civil No. 88-0461, slip op. at 3 (D.D.C. March 31, 1989) (technical scores and technical rankings of competing contract bidders held predecisional and deliberative); *Professional Review Organization v. HHS*, 607 F. Supp. 423, 427 (D.D.C. 1985) (affording Exemption 5 protection to scores used to rate procurement proposals).[5]

5. We note that Infosystems' initial FOIA request sought access to "the evaluated prices for all bidders." *FOIA Request Letter*, July 19, 1990, at 1. Within the context of Infosystems' request, the OMD apparently interpreted this statement as a request for the evaluated cost points awarded to each bidder.[6] On appeal, Infosystems states that "listings of the prices bid (bid abstracts) are commonly available in federal procurements . . . . such as this one." *FOIA Appeal Letter*, August 10, 1990, at 2. To the extent that Infosystems sought access to the total cost figures proposed by each bidder, this information is protected from mandatory disclosure by Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).[7] In this case, the bidding process could be reopened to all of the bidders as a result of a pending protest proceeding before the General Accounting Office (GAO). *See* note 2, *supra*. Disclosure of the total costs proposed by the bidders at this juncture could cause substantial harm to their competitive posture if the contract is resolicited. For the same reasons, we agree with the OMD's determination to withhold the awarded contract and the awardee's price listing and proposal. Pending the outcome of the GAO protest proceeding, this information is protected under Exemption 4 of the FOIA.[8] If the agency's award to DCC is sustained, however, DCC's price listing and the resulting contract will become publicly available pursuant to federal acquisition regulations. *See* 48 C.F.R. §§ 5.303; 15.1001.[9]

6. In view of the foregoing, the Application for Review filed by TS Infosystems, Inc. is denied. Infosystems may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

7. The officials responsible for this action are the following Commissioners: Albert C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 5 U.S.C. § 552.

[2] On July 19, 1990, International Transcription Services, Inc., incumbent contractor and unsuccessful bidder in this procurement activity, filed a protest against the contract award before the General Accounting Office. This proceeding is still pending.

[3] Infosystems' FOIA request consisted of thirteen questions. The OMD fully responded to eight of those inquiries. The remaining five items are the subject of the instant Application for Review.

[4] Exemption 5 prevents the disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been interpreted to incorporate certain common law privileges developed in civil discovery cases, including, among others, the deliberative process privilege. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). Generally, this privilege protects advice, recommendations, and opinions which are part of the deliberative, consultative, and decisionmaking process leading to the adoption of an agency decision. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy, supra.*

[5] Infosystems further states that it seeks access to the technical scores and relative ranking of the offerors so it "may be better prepared for future bids," and to "determine how [it compares] to [its] competitors for future bidding purposes." *FOIA Appeal Letter*, August 10, 1990, at 1-2. The Commission has authorized public disclosure of information that is otherwise exempt from disclosure under the FOIA only where there is a sufficient showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. *See Western Union Telegraph Co.*, 2 FCC Rcd 4485, 4487 (1987); *Classical Radio of Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978). Infosystems has not presented a compelling interest sufficient to justify public disclosure. Rather, Infosystems merely seeks to enhance its own competitive posture in future procurement activities.

[6] The cost evaluation team arrived at those scores by using a cost evaluation formula specified in the RFP to evaluate the prices proposed by each bidder for each service requested by the contract.

[7] Exemption 4 is designed to protect "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). Generally, information is confidential if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

[8] The OMD denied access to DCC's price listing and proposal and to the awarded contract pursuant to Exemption 5. For the reasons discussed in paragraph 6 above, we believe the material properly should have been withheld pursuant to Exemption 4 . *See Shermco Industries v. Secretary of Air Force*, 613 F.2d 1314, 1317 (5th Cir. 1980).

[9] Total costs proposed by unsuccessful bidders may be protected from disclosure under Exemption 4 even subsequent to a final contract award by the agency. *See Raytheon Co. v. Department of the Navy*, Civil No. 89-2481, slip op. at 2-3 (D.D.C. Dec. 22, 1989). We need not reach here whether, subsequent to a final contract award, Exemption 4 would apply to the costs proposed by unsuccessful bidders. We also do not reach whether the successful bidder's proposal, containing both technical and price strategy data, would be exempt from disclosure after the final award. *See SMS Data Products Group, Inc. v. Department of the Air Force, supra.; Landfair v. Department of the Army*, 645 F. Supp. 325, 329 (D.D.C. 1986); *Professional Review Organization v. HHS*, 607 F. Supp. at 426.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-172

In re Applications of

CAROL SUE BOWEN — File No. BPH-880406MH

Joseph B. Prater and Joseph P. Durham, A Partnership, d/b/a PRATER and DURHAM — File No. BPH-880406MJ

HEART OF VIRGINIA BROADCASTING — File No. BPH-880407ND

For Construction Permit for
New FM Station, Channel 268A,
Vinton, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. Prater & Durham's (P & D) application was dismissed by Administrative Law Judge Joseph Chachkin (ALJ) because P & D failed to timely demonstrate its financial qualifications, and did not comply with its document discovery obligations. *See Order*, FCC 90M-2997, released September 21, 1990. P & D's appeal from that *Order* was filed October 10, 1990; a joint opposition was filed October 16, 1990 (and supplemented November 13); and P & D's response was filed November 28, 1990. The Board will affirm the ALJ's dismissal of P & D, which is fully supported by the factual record and controlling precedent.

BACKGROUND

2. P & D's application (FCC Form 301), as filed April 6, 1988, contained a negative response to the financial certification question, with the statement that the "applicant is in the process of obtaining finances." Some two years passed without P & D resolving its financial problems, and the *Hearing Designation Order*, 5 FCC Rcd 2973, 2974 (1990), thus specified a financial issue against P & D.

3. At the prehearing conference convened on July 20, 1990, more than two months after designation for hearing, the ALJ noted on the record P & D's financial defects. Tr. 4-5. Counsel then represented before the ALJ that P & D now had "acquired the necessary resources of financing" and would, within 30 days, file a motion for summary decision on P & D's the financial issue. Tr. 5-6. Opposing counsel urged that P & D would be required to show "good cause" for its belated financial showing, citing *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *aff'd*, 5 FCC Rcd 2843 (1990). Counsel for P & D responded that here, unlike the *Bernstein* case, the other parties would not be "prejudiced by lack of discovery on the issue. They'll have their full chance to discover, the facts will be made known [in its motion for summary decision] before discovery begins." Tr. 7-8.

4. The presiding ALJ then cautioned P & D's counsel (Tr. 8; emphasis added):

> Well, I think it's certainly advisable . . . that you file your motion for summary decision as soon as you can and I think if you can file it sooner than thirty days, it may forestall the necessity for discovery on that issue if it's as clear cut -- for instance, if you have a bank loan.
>
> I don't know what you're relying on, but . . . *it's in your interest to file your motion for summary decision as soon as you can. And also an argument won't be able to be made that you delayed discovery, you know, that you prejudiced the parties. So I think ... the quicker you can file your motion for summary decision and put your cards on the table as to what your financial showing is, it would be better for all concerned.*
>
> *Particularly, there is a number of cases, I know, going through the Commission as to whether or not an amendment is necessary or not . . . .*

5. At that same prehearing conference, the ALJ also indicated that discovery (including the taking of depositions) should be completed in early September: "I have no problem with early September. I don't think it should be much later than that." Tr. 12. Thereafter on August 7, 1990, the ALJ released an *Order*, FCC 90M-2410, granting an unopposed joint motion for production of documents "requiring P & D to produce documents relative to financial issue by August 17, 1990." Nonetheless, some two months after the prehearing conference, and more than four months after designation of the issue, P & D had still failed to file its promised motion for summary decision, and further failed to comply with the specified directive of the ALJ to produce its financial documents by August 17, 1990.

6. After considering several motions and responsive pleadings filed by the parties, the ALJ released his September 21, 1990 *Order* dismissing P & D's application. There, the ALJ found that "as of this date, a motion for summary decision has not been filed" by P & D and that (*Order* at para. 3):

> A broadcast applicant must be "ready, willing and able" to meet the Commission's financial requirements, certainly once the hearing has been designated, unless some unanticipated event requires an application amendment." *Edwin A. Bernstein*, 4 FCC Rcd 8420, 8421 (Rev. Bd. 1990). Here, by its own admission, P & D was not qualified when it filed its application in April 1988. Moreover, as of this date, some 27 months later, it has not cured this critical deficiency. The Review Board has made clear that any effort to demonstrate financial qualifications after the 30 day period allowed after designation for

> filing of amendments as "a matter of right," must meet the rigorous "good cause" test for post-designation amendments set forth in Rule 73.3522(b). *Bernstein, supra* ; *Northampton Media Associates*, 3 FCC Rcd 5164, 5169 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 5517 (1989). It is abundantly clear in light of P & D's utter lack of diligence in establishing its financial qualifications that P & D can not meet the required "good cause" test for post-designation amendments. Under these circumstances, no purpose would be served in delaying action on P & D's dismissal until such time in the future when P & D attempts to put its financial house in order. Consistent with the holding in *Bernstein*, P & D's failure to cure its financial deficiences in a timely and diligent manner requires dismissal of its application. (footnotes omitted)

In the first two footnotes to his *Order*, the ALJ observed (1) that some uncertainty was expressed at the prehearing conference as to the need to amend under the certification procedure, but that "[t]he cases cited leave no doubt that an amendment is required"; and (2) that P & D's failure to attempt to make a financial showing, even at this late date, raised a serious question whether its statement in its application that it was in the process of obtaining financing had any factual foundation, and "if P & D's application was not dismissed, a misrepresentation/lack of candor issue would be added against P & D."

7. The second prong of the dismissal *Order* rested upon P & D's failure to comply with its document production obligations. On this point the ALJ first found that (*Order* at para. 6.):

> P & D was ordered to produce *all* documents by August 17, 1990. It has no authority to unilaterally change the date or terms of such production. Such authority reposes exclusively with the Presiding Judge and P & D's failure to comply with the Presiding Judge's *Order* can not be countenanced. Contrary to P & D's assertion, P & D's failure to produce the documents in a timely fashion has prejudiced the parties. While the hearing is scheduled for November, it was contemplated that the taking of depositions would be completed in the *early part of September* (Tr. 12). Until the production is complete, the parties will not be in a position to know the identity of the deponents with knowledge pertinent to the financial issue. Thus, P & D's conduct has effectively foreclosed meeting the September schedule.

Lastly, the ALJ found that (*id.*, at para. 6):

> [A]lthough mandated by the Presiding Judge more than three months ago [FCC 90M-1592, June 11, 1990, at 2], P & D has failed to participate in the preparation of a joint motion for production of documents with respect to the comparative issue. In this connection, the parties recite that prior to the July 20 prehearing conference, a joint motion was drafted and provided to P & D's counsel for his review. To date, P & D had provided no comments on that draft. P & D's failure to act has delayed the taking of depositions on the comparative issues and further prejudiced the parties. P & D's conduct falls far short of the conduct which the Commission can and does expect of broadcast applicants and provides additional support for dismissal of P & D's application. *See Warren Price Communications, Inc.*, 2 FCC Rcd 7409 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 1992 (1989), *recon. denied*, 5 FCC Rcd 2906 (1990).

DISCUSSION

8. P & D's major point in its Appeal, pp. 1-4, is that dismissal of its application for failure to amend violated its "due process rights to notice of the procedures to be employed by the Commission." Relying on *RKO General, Inc.*, 24 RR 2d 16, 19 (1972), and similar cases, it urges that prior to the Commission's adoption of the financial certification requirement an applicant like P & D was "not required to amend prior to submitting evidence under the financial qualifications issue." *Id.*, at 2-3. It also urges that at the prehearing conference the ALJ expressed doubts about whether an amendment was necessary, and "did not order P & D to file a financial amendment as he has the authority to do under Rule 73.3514(b)." *Id.*, at 3-4.

9. The competing applicants respond that "P & D relies on hoary precedent" and ignores *Bernstein, supra*, "the most recent Review Board and Commission authority on this point [which] directly contradicts P &D's argument" and which was called to P & D's attention during the prehearing conference. Tr. 6-7. Further, both the Board's and the Commission's actions in *Bernstein* were released before the adoption of the *Hearing Designation Order* in this case, giving P & D ample notice of the applicable Commission procedures. Opposition, pp. 1-3.

10. We agree that P & D's argument is based upon "out-dated policies and precedent." Recently, after reviewing many of the relevant authorities in *Albert E. Gary*, 5 FCC Rcd 6236 para. 9 (Rev. Bd. 1990), we found that:

> From the 1960s until the adoption of the (now-abandoned) financial certification requirements, *Revision of Form 301*, 50 RR 2d 381 (1981), the Commission followed a liberal "policy of permitting an applicant to remove a disqualifying factor through amendment during hearing. *See Fisher Broadcasting Co.*, 30 FCC 177 (1961), and *Beacon Broadcasting Systems Inc.*, FCC 60-118, 19 RR 927 (1960)." *Azalea Corp.*, 31 FCC 2d 561, 563 (1971). Applicants were permitted to amend in response to petitions to add financial issues, *William R. Gaston*, 35 FCC 2d 615, 619 (Rev. Bd. 1972); many months after designation of a financial issue for hearing, *Click Broadcasting Co.*, 25 FCC 2d 511, 513 (Rev. Bd. 1972); on the eve of the hearing, *Bison City TV* 49 L. P., 91 FCC 2d 26, 28-29 (Rev. Bd. 1982); and even after the hearing record was closed. *Gilbert Broadcasting Group*, 68 FCC 2d 186, 207-208 n.54 (Rev. Bd. 1978). This practice changed with the adoption of certification.

Significantly, in *Bernstein*, 5 FCC Rcd at 2843 n.1, the Commission squarely rejected a contention identical to that profered by P & D that *RKO General, supra*, established that a prompt financial amendment is not a condition precedent to the prosecution of an application. The Commission responded in *Bernstein* that the "argument is

without merit in light of the Commission's ruling in *Chudy Broadcasting Corp.*, 58 RR 2d 133 (1985), affirming the dismissal of an application for lack of a financial proposal. Significantly, the Commission there noted that 'temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service.' 58 RR 2d at 134 n.7." *See also Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, at paras. 2-3 (1986), where the Commission emphasized its responsibility to provide new service to the public in the most efficient and expeditious manner possible, an integral part of the public interest. *See also CSJ Investments, Inc.*, FCC 90-367, released November 18, 1990, at para. 8. Thus, like the ALJ, we have no doubt that the *Chudy-Hillebrand-Bernstein* line of cases, which stretches from 1985 to 1990, gave P & D ample notice that it had to demonstrate good cause for an amendment.[1]

11. Here, P & D's complete failure to amend to establish its financial qualifications (the first prong of the ALJ's *Order)* was aggravated by its failure to comply with *Orders* for the production of documents, and the ALJ's instructions establishing a deadline for the taking of depositions. First, P & D failed to file a motion for summary decision, which might have obviated the need for discovery on the financial issue, after promising the ALJ that it would do so (*see* para. 3, above). Second, it failed to produce its financial documents by August 17, 1990 as ordered by the ALJ, and lastly, it failed to comply with an earlier *Order,* regarding "the production of documents with respect to the comparative issue," (*see* paras. 5 and 7, above).

12. We agree with the ALJ's finding that these defaults delayed the taking of depositions, prejudiced the other parties, and "foreclosed meeting the September schedule." *Order* at para. 6. This second prong of the ALJ's *Order,* standing alone, is sufficient to justify dismissal of the application. *See Lorraine Walker Arms,* 5 FCC Rcd 3426, 3427-28 (Rev. Bd. 1990), *aff'd,* FCC 90-365, released November 21, 1990, and *Warren Price Communications, Inc., supra.* In sum, the factual record and the relevant precedent establish that either prong of the ALJ's ruling, standing alone, justified the dismissal of P & D's application.[2] Its appeal is therefore denied.

13. ACCORDINGLY, IT IS ORDERED THAT Prater & Durham's Appeal from Order Dismissing Application filed October 10, 1990, IS DENIED; and that the Motion to Strike Notice of Appeal filed October 3, 1990, by Carol Sue Bowen and Heart of Virginia Broadcasting IS DISMISSED as Moot.[3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTES

[1] To the extent that the ALJ's ruling, quoted above in para. 6, suggests that an applicant fully aware of a basic qualification problem with its application for a long period of time prior to designation may simply amend as a matter of right within 30 days of the *Hearing Designation Order,* we recall the Court's response to an identical assertion in *Cleveland Television Corp. v. FCC,* 732 F2d. 962, 965 n. 2 (D.C. Cir. 1984):

> Under the Commission's rules, an amendment may be made after the cut off date (1) "only upon a showing of good cause for late filing" or (2) as a matter of right if the amendment "relate[s] to issues first raised in the [hearing] designation order." *See* 47 CFR §73.3522 (b) (1), (2) (1982).
>
> The Commission defends the acceptance of the amendment on two grounds. First, it argues that the amendment relates to an issue "first raised in the designation order," i.e., the cross-ownership issue. As the ALJ explained, "While Channel 19 was undoubtedly cognizant of the cross ownership problem . . . the matter was not identified as one requiring an evidentiary hearing until the order of designation was issued." J.A. at 46. This explanation, however, proves too much, for it would apparently permit [free] amendment as to any issue set down for hearing by the designation order. After all, the purpose of the hearing designation order is to identify issues "requiring an evidentiary hearing." By contrast, the regulations permit amendment as to "issues first raised" in the designation order, not issues first set down for hearing in the order.

Cf. CR Broadcasting, Inc. 5 FCC Rcd 5348, 5349 para. 7 (Rev. Bd. 1990); *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6326 n.36 (Rev. Bd. 1990) (original certification must be valid).

[2] We do agree with the presiding ALJ (*Order,* n.2) that if P & D's application is not dismissed a misrepresentation or lack of candor issue would be added against P & D because of its fallacious representation that the applicant since April of 1988 has been "in the process of obtaining finances." *See Bernstein,* 4 FCC Rcd at 8422 n.6.

[3] Because of the time element involved, we have served prepublication copies of this *Order* on the parties and the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-311

In re Applications of

MARC A. ALBERT	File No. BPH-870918MC
TAYLOR COMMUNICATIONS OF SYRACUSE, INC.	File No. BPH-870918ML
SALT CITY COMMUNICATIONS INC.	File No. BPH-870918MN
HUSTON TELECOM, INC.	File No. BPH-870918MX
D.J.'S BROADCASTING CO.	File No. BPH-870918MY

For Construction Permit for
New FM Station, Channel 290A,
Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL issuing a Separate Statement.

1. Before the Review Board is an Appeal, filed November 26, 1990, by Huston Telecom Inc. (Huston) from *Memorandum Opinion and Order*, FCC 90M-3622, released November 15, 1990, by Chief Administrative Law Judge Joseph Stirmer (ALJ), ultimately dismissing Huston's application from the captioned proceeding. D.J.'s Broadcasting Company (DJ's) and Salt City Communications, Inc. (Salt City) filed a joint opposition to Huston's appeal on December 4, 1990, and the Commission's Mass Media Bureau (Bureau) similarly opposed the appeal on December 7, 1990.

BACKGROUND

2. Huston is (now) a corporate applicant with two classes of stock (voting and non-voting) initially organized by Sonrise Management Services, Inc. (Sonrise), and originally represented by Thomas L. Root, P.C. (Root) (Huston Appeal at p. 2). Huston's principal, Randall Lynn Huston, purportedly relied upon Sonrise and Root assurances that sufficient funds would be available for construction and operation of Huston's proposed facility; thus, upon filing, Huston affirmatively certified in its application (FCC Form 301) that it had reasonable assurance of financing for its station.[1] *Id.* Nevertheless, Huston admits that "[*I*] *t is conceded that [at the time of filing its application], Huston was not financially qualified* " pursuant to Commission rule and precedent. *Id.*, at p. 3; (emphasis added).

3. By *Memorandum Opinion and Order*, FCC 90M-601, released March 22, 1990, the ALJ added the following issues with respect to Huston:

> 1. To determine whether Huston is financially qualified to construct and operate its proposed Syracuse FM radio station;
>
> 2. To determine whether Huston lacked candor or misrepresented facts in originally certifying that it was financially qualified to construct and operate its proposed station; and,
>
> 3. To determine, in light of the evidence adduced under the foregoing issues, whether Huston possesses the basic qualifications to be a Commission licensee.

4. Following addition of these issues, the ALJ conducted a pre-hearing conference and issued two *Orders* (FCC 90M-1609, released June 11, 1990; FCC 90M-2675, released August 24, 1990) scheduling further hearings and dates for exchanging direct written testimony. Huston was required to submit its written testimony meeting these financial issues on October 8, 1990. However, in reviewing Huston's submission, the ALJ observed (FCC 90M-3622 at n. 2):

> Huston's direct case exhibits consist essentially of prior declarations prepared by Mr. Huston and filed in this proceeding. Those declarations were found insufficient to resolve requests for financial issues in favor of Huston. They are clearly insufficient to favorably resolve the financial issues which have been specified.

Thus, the ALJ concluded (*id.*, at paras. 3, 9-10): [2]

> Because it is absolutely clear from the exhibits exchanged by Huston that Huston failed to fulfill its fundamental obligation of obtaining reasonable assurance of funding before certifying its financial qualifications, the financial qualifications issue must be resolved against Huston.
>
> * * *
>
> An applicant for broadcast facilities must be found financially qualified to build and operate the proposed station. 47 U.S.C. 308(b) . . . . To establish its financial qualifications, an applicant must have "reasonable assurance" of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed facility for three months without revenue. *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158 (1990); *JAM Communications, Inc.*, 4 FCC Rcd 3754 (1989). And, the applicant must have such financial

qualifications at the time it files its application and certifies its financial qualifications. *Aspen FM, Inc.*, 5 FCC Rcd 3196 (1990); *Shawn Phalen*, 5 FCC Rcd 4669 (1990). In the event the applicant certifies its financial qualifications, it cannot thereafter amend its financial proposal without first establishing that the applicant was financially qualified at the time of certification. *Albert E. Gary*, [5 FCC Rcd 6235 (Rev. Bd. (1990)]; *Pepper Schultz*, 5 FCC Rcd 3273 (1990). Thus, initial financial qualifications become an essential ingredient to a good cause showing for a later financial amendment. *Marlin Broadcasting of Central Florida, Inc.*, [5 FCC Rcd 5751 (1990)].

When Huston filed its application and certified its financial qualifications, it did not have "reasonable assurance" of sufficient net liquid assets on hand or funds available from committed sources to construct and operate its proposed station . . . . The conversation Mr. Huston had with a representative of Sonrise did not provide the applicant with reasonable assurance of financing. Moreover, the brief discussions with representatives of the Chase Bank also failed to provide the applicant with reasonable assurance of financing. Specifically, it has been held that discussion of the possibility of bank financing with bank officials does not constitute reasonable assurance of financing. *Marlin Broadcasting of Central Florida, supra*. Yet, that is all Mr. Huston did. In neither case did any bank issue a letter providing Huston with reasonable assurance of financing. In fact, to this day, Huston has failed to introduce into this proceeding any bank letter reflecting that it had reasonable assurance of financing at the time the application was filed and the financial certification made. In this respect, the applicant here is in a worse posture than the applicant in *Roxanne Givens*, 5 FCC Rcd 5371 (1990). In *Givens*, the applicant at least had a loan letter, although it was clearly deficient. Here, the applicant had nothing at the time of certification and still has nothing demonstrating it was financially qualified when it filed its application. Huston argues that it acted in good faith in certifying its financial qualifications. But, the good faith of the applicant has nothing to do with the question whether the applicant was financially qualified. *Aspen FM, Inc., supra*. Specifically, when a financial issue is specified, the applicant must adduce probative evidence which "necessarily includes something more than the self-serving, uncorroborated statement[s] of the individual responsible for the certification that he had taken steps to secure the needed funds." *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). Huston has utterly failed to meet this test in any way which would demonstrate that the applicant was financially qualified when it filed its application.

In light of the foregoing, the ALJ (1) granted the pending Motion for Summary Decision filed by DJ's (2) adversely resolved the financial qualifications issue specified against Huston; and (3) dismissed Huston's application.

5. In its Appeal, Huston asserts (1) that the refusal of the ALJ to allow a later amendment designed to cure an initially defective financial certification is an inappropriate "draconian standard"; (2) that this standard post-dates Huston's financial certification here, the standard "must be more consistent with fairness, due process, and the general practice of the Commission," and that "[a]n initial failure to meet the Commission's standard should not, *ipso facto*, require disqualification regardless of the surrounding circumstances." Appeal, at pp. 4-5. Huston also argues (3) that even if summary decision was appropriate here, the ALJ erred in dismissing its application; and, finally (4) that the "severe page limitation" attendant to appeals precludes "full argument." *Id.*, at pp. 6-7.[3] DJ's and Salt City, as well as the Bureau, urge that the ALJ's reasoning was correct, and that Huston's Appeal must be denied.[4]

DISCUSSION

6. We cannot improve upon the ALJ's cogent reasoning and conclusions set forth in para. 4, *supra*. Huston admits that it was not financially qualified when it filed its application; and when given an opportunity to meet the financial issues designated against it, Huston proffered nothing of substance to demonstrate its financial qualifications. Having "failed miserably" to show that it is financially qualified, Huston must fail in its Appeal. *Christian Childrens Network, Inc.*, 1 FCC Rcd 982 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 7395 (1987); *see Local Morgan Hill Radio Associates*, 4 FCC Rcd 2404 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 498 (1990) (adverse summary decision granted and applicant dismissed for failure to present evidence on specified issues).

7. As to Huston's later request to amend after its admittedly fallacious financial certification, the Board recently reiterated in *Albert E. Gary*, 5 FCC Rcd at 6236:

> From the 1960s until the adoption of the (now-abandoned) financial certification requirements, *Revision of Form 301*, 50 RR 2d 381 (1981), the Commission followed a liberal "policy of permitting an applicant to remove a disqualifying factor through amendment during hearing. *See Fisher Broadcasting Co.*, 30 FCC 177 (1961), and *Beacon Broadcasting Systems Inc.*, FCC 60-118, 19 RR 927 (1960)." *Azalea Corp.*, 31 FCC 2d 561, 563 (1971). Applicants were permitted to amend in response to petitions to add financial issues, *William R. Gaston*, 35 FCC 2d 615, 619 (Rev. Bd. 1972); many months after designation of a financial issue for hearing, *Click Broadcasting Co.*, 25 FCC 2d 511, 513 (Rev. Bd. 1972); on the eve of the hearing, *Bison City TV 49 L.P.*, 91 FCC 2d 26, 28-29 (Rev. Bd. 1982); and even after the hearing record was closed. *Gilbert Broadcasting Group*, 68 FCC 2d 186, 207-208, n. 54 (Rev. Bd. 1978). This practice changed with the adoption of certification [in 1981].

See generally Mableton Broadcasting Co., Inc., 5 FCC Rcd 6314, 6326 n. 26 (Rev. Bd. 1990) (original certification must be valid); *Carol Sue Bowen*, FCC 90R-120, adopted December 12, 1990. And, as the Commission recently declared in *Marlin Broadcasting, supra*, at ¶ 6: "As [the applicant] did not have reasonable assurance of financial qualifications at the time of certification on March 19, 1985, it was not entitled to rely on the [later-obtained] May 1, 1987 bank letter to support the earlier certification." In light of all the foregoing, we find no error in the

ALJ's grant of the adverse summary decision and the ultimate dismissal of Huston's application. *Local Morgan Hill, supra ; see also Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *aff'd*, 5 FCC Rcd 2843 (1990) (summary dismissal appropriate where financial issue not met).

8. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Huston Telecom, Inc., on November 26, 1990 (as supplemented on November 28, 1990), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Huston states in its Appeal (at p. 3) that:

> As of the date its application was filed, Huston thus resembled numerous other applicants organized by Sonrise and advised by Root. Thereafter, however, Huston distinguished itself from the mass of Sonrise applicants who have voluntarily dismissed their applications or had their applications dismissed for failure to prosecute. Even before the extent of the Sonrise/Root scam had become evident, Mr. Huston repeatedly sought to satisfy the Commission's "reasonable assurance" standards -- as he understood them -- by personally seeking alternative, independent sources of financing. Moreover, when the nature of the fraud perpetrated by Sonrise/Root did become evident, Mr. Huston not only retained new counsel, the applicant itself was reconstituted so that it contained only those members of its non-voting shareholder who had demonstrated a willingness to pursue the project by investing additional funds and personally appearing at depositions scheduled by Huston's opponents. Mr. Huston also expended the time, funds and energy necessary to appear at depositions and the hearing under other issues which had been specified against the applicant.

[2] More specifically, the ALJ detailed the following with respect to Huston (*Order*, at paras. 4-8):

> According to the declarations submitted by Huston in support of its direct case under the financial issues, Mr. Huston's estimated budget was based on a budget given to him by Sonrise, as confirmed by his past experience in radio and as a prior FM applicant for a construction permit for Van Buren, Indiana. Huston estimated construction and initial operating expenses at approximately $500,000. No breakdown of these estimated expenses has been provided.
>
> To meet these estimated expenses, Mr. Huston spoke with Marty Bishop of Sonrise who informed him that Sonrise "had had conversations with various banks such that Huston would have no problem securing the financing of up to the $500,000 which it might need." No documentation of any kind was secured from any bank by Huston nor was any effort made by Huston to secure funding from any of the banks with which Sonrise allegedly had conversations. Huston's financial certification was based on Mr. Huston's belief that Sonrise had secured financing for Huston Telecom Partnership, Huston Telecom, Inc.'s predecessor.
>
> Additionally, Huston's financial certification also was based on discussions regarding financing in the amount of $500,000 from Chase Lincoln First Bank (now Chase Bank) (Chase Bank) in Syracuse, New York, where Mr. Huston had been a customer. In August or September of 1987, Mr. Huston personally visited with George Koularis, who handled his account at Chase Bank and who introduced Mr. Huston to Joe Cutrone, of Chase Bank's investment division. Mr. Huston then discussed with Mr. Cutrone the bank's willingness to provide Huston with reasonable assurance of construction and initial operating expenses. Mr. Huston informed Chase Bank that estimated construction and initial operating expenses would be $500,000 and detailed what the funds would be used for. Mr. Huston provided the bank with oral information concerning his background in the broadcast business, including the news, sales and management responsibilities he had. He also explained that he personally would be in charge of the operation.
>
> According to Mr. Huston, he was advised that there apparently was no problem with his proposal, and that the necessary arrangements would be worked out upon grant of the application. Mr. Huston relied on these statements, as well, when certifying that Huston had reasonable assurance of financing.
>
> It is significant to note that Huston has provided no documentation whatever demonstrating its financial qualifications at the time its application was filed. No bank letters have been exchanged from any of the banks Sonrise and Huston were allegedly relying on, nor has any bank letter been exchanged from the Chase Bank. Moreover, no declarations or testimony have been provided by the two bank officials of the Chase Bank with whom Mr. Huston discussed financing. In short, despite having to meet financial issues in this hearing, Huston has failed to produce documentary evidence of its financial qualifications when its application was filed. [Footnote omitted].

[3] However, this "severe" page limitation did not preclude Huston from filing an 8-page Appeal and a 7-page Supplement thereto. 47 CFR §1.301(c)(5) states that appeals filed pursuant to this section of the Commission's Rules "shall not exceed 5 double-spaced typewritten pages."

[4] Ordinarily, the Bureau would not participate with respect to such a matter as that presented here. However, as the Bureau notes in its Opposition (at n. 1): "Consistent with recent practices, the Bureau has been an active participant in the hearing concerning Huston's qualifications because Huston was organized by Sonrise Management Services, Inc."

SEPARATE STATEMENT
OF
BOARD MEMBER NORMAL B. BLUMENTHAL

Having expressly conceded that its application was conceived in fraud (*see ante* note 1), Huston's belated effort to purge the taint is unavailing. *See generally Newton Television Limited,* 3 FCC Rcd 553, 558 n. 2 (Rev. Bd. 1988).

As we have had long-previous occasion to note, where an application is suffused with fraud at the outset, we should be deaf to claims of the "equities" of the "in-

nocent," but should adhere rather to the ancient judicial maxim *'crimen omnia ex se nata vitiat." West Jersey Broadcasting Co.*, 90 FCC 2d 363, 375 (Rev. Bd. 1982).

Huston's (admittedly) specious financial certification is but the *initial* proximate cause of its dismissal; its own admissions resonate that its application, *en gross,* was bereft of substance when filed. Huston should be relieved that the worst federal action it might here face is dismissal of its hollow application. *See* 18 U.S.C. § 1001.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-357

In re Applications of

SWAN BROADCASTING LIMITED	File No. BPCT-870717KQ
CRESCENT CITY BROADCASTING CORPORATION	File No. BPCT-880419KE
DELTA BROADCASTING OF LOUISIANA, LTD.	File No. BPCT-880419KF
Robert H. and Janee M. Tucker d/b/a TUCKER BROADCASTING COMPANY, LIMITED PARTNERSHIP	File No. BPCT-880419KG

For Construction Permit for New Television Station, Channel 20, New Orleans, Louisiana

Appearances

Leo I. George, *Pamela C. Cooper*, and *Mark Van Bergh*, on behalf of Swan Broadcasting Limited; *DeWitt C. Conklin*, on behalf of Crescent City Broadcasting Corporation; *Jeffrey D. Southmayd* and *Michael R. Miller*, on behalf of Delta Broadcasting of Louisiana, Ltd.; *Bradford D. Carey*, *Marjorie R. Esman*, and *Craig E. Frosch*, on behalf of Robert H. and Janee M. Tucker, d/b/a Tucker Broadcasting Company, Limited Partnership.

DECISION

Adopted: December 17, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Now before the Review Board are the *Initial Decision*, 5 FCC Rcd 3045 (1990) (I.D.) of Administrative Law Judge Edward J. Kuhlmann (ALJ), granting the Construction Permit application of Delta Broadcasting of Louisiana, Ltd. (Delta) for a new commercial television station, proposed to operate on Channel 20, at New Orleans, Louisiana, as well as the exceptions and replies thereto filed by all of the above-captioned parties. Based upon our review of the pleadings and the hearing record below, and having heard oral argument on October 26, 1990, we reverse the ALJ's ultimate grant to Delta, uphold his denial of the applications of Crescent City Broadcasting Corporation (Crescent) and Tucker Broadcasting Company, Limited Partnership (Tucker), and determine that Swan Broadcasting Limited (Swan) is the preferred applicant.

BACKGROUND

2. The *Hearing Designation Order*, 3 FCC Rcd 4751 (1988) (HDO), released in this proceeding, originally designated the four applicants in the caption, and two others now dismissed, for consolidated hearing on the "standard comparative" issue, which is governed primarily by the guidelines enunciated in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) *("Policy Statement")*. In his analysis under this issue, the ALJ found that the only decisional distinction for selecting the best comparative applicant was the ownership and voting control of the various applicants' principals who proposed to be integrated into the day-to-day managerial operations of the new New Orleans station. *Policy Statement*, 1 FCC 2d at 395 (full-time participation in station operation by owners considered a factor of substantial importance since it is "desirable that legal responsibility and day-to-day performance be closely associated"). Both Swan and Delta were awarded an identical 100% quantitative credit for proposing to integrate their entire voting ownership into management positions. Crescent and Tucker, on the other hand, received no credit because (1) Crescent's directors did not propose to work at the station on a day-to-day basis; and (2) Tucker's principals purportedly could not effectuate their proposals due to outside commitments. As between Swan and Delta, the ALJ looked to the qualitative enhancements of the participating owners and selected Delta because its sole voting principal's "much longer residence . . . combined with . . . broadcast experience" outweighed Swan's female preference and shorter-term residence. I.D., at para. 33.

CRESCENT CITY

3. Crescent, a non-profit, non-stock corporation governed by three directors,[1] concedes in its brief (at 12) that it "does not propose the boilerplate full-time on-site managerial-level positions common to the [integration analysis of the] comparative process"; nonetheless, it argues that its proposal (consisting of minority principals purportedly seeking to better conditions for low and moderate income families) is the most consistent with the Commission's objective of identifying the best practicable service. As the Board is not empowered, however, "to make new policy or change old policy," *Horne Industries, Inc.*, 53 RR 2d 1647, 1648 (1983), we affirm the ALJ's conclusion that Crescent is not entitled to any integration credit, since its directors do not propose to work full-time at the station. *See generally Julia S. Zozaya*, FCC 90-355, released November 8, 1990.[2]

4. In light of the foregoing, Crescent is not a viable applicant here. With respect to the remaining applicants, the decisional questions raised by the exceptors are: (1) whether the ALJ erred in wholly discounting Tucker's claimed integration proposal; (2) whether he was correct

in crediting Swan's 100% quantitative integration proposal; (3) whether Swan or Delta prevails comparatively on the qualitative enhancements of their respective integrated owners; and (4) whether Swan's application may be granted without a further evidentiary hearing, in light of a felony conviction and subsequent pardon of Swan's sole voting principal.

TUCKER BROADCASTING COMPANY

5. Tucker is a limited partnership, consisting of two general partners, Robert H. Tucker, Jr. and Janee M. Tucker (husband and wife), each with 50% voting authority. I. D., para. 8. Robert Tucker proposes to work at the station full-time as general manager, while Ms. Tucker represents that she will work full-time as station manager. *Id.* They presently own and are employed at Tucker and Associates, Inc. (TAI), a consulting organization offering management and technical services to the public and private sectors. Mr. Tucker holds a 49% equity ownership in TAI. *Id.* Ms. Tucker serves as TAI's president and chief executive officer, and is a 51% owner. *Id.*, para. 27; Tucker Exh. 4.

6. Although both Mr. and Ms. Tucker pledged to resign from TAI in the event of a grant of their application, the ALJ concluded that they could not, in fact, effectuate their integration commitments. I. D., para. 30. He found that Ms. Tucker was contractually obligated to work full-time at TAI, and prohibited from outside employment, by virtue of that firm's participation in the Section 8(a) program administered by the Small Business Administration (SBA). That program, as we have previously noted in an analogous case, *see Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 680 (Rev. Bd. 1986), is a federal minority contract set-aside program designed to assist individual minority entrepreneurship. The applicable SBA regulations require that the principal owners of an 8(a) concern must maintain exclusive control and management over the daily business operations of the firm. 13 CFR §124.104. At least one of the owners must hold a full-time position as President and/or CEO and is precluded from any outside employment or business interest which hinders the 8(a) firm from achieving its business objectives. *Id.* The ALJ found that Ms. Tucker had renewed her SBA Sec. 8(a) certification on December 17, 1989, following the hearing here. I.D., para. 29. With respect to Mr. Tucker, the ALJ discounted his proposal based on testimony that Mr. Tucker would remain at TAI until the station is operational. *Id.*, paras. 28, 30.

7. Tucker excepts to the denial of its quantitative integration credit, arguing that the ALJ "incorrectly assumed," based on Ms. Tucker's intent to retain SBA Sec. 8(a) status for TAI, that she has an "ongoing obligation" at TAI which would preclude her from fulfilling her integration pledge. It submits that TAI's SBA Sec. 8(a) requirements were scheduled to expire October 1990, and it proffers a letter from the New Orleans SBA District Counsel, Alan J. Wells, dated May 1, 1990, which, it claims, clarifies that the SBA Sec. 8(a) program would in no way interfere with the Tuckers' full- time integration pledges. Tucker further argues that Mr. Tucker's testimony that he would work at TAI until the station became operational provides no legal basis for denying him integration credit, since Commission precedent does not require "applicants to forsake their livelihood while their applications are pending," citing *Cuban American Ltd.*, 2 FCC Rcd 3264, 3269 (Rev. Bd. 1987).

8. *Discussion re : Tucker* : It is long-standing Commission precedent that an applicant is not entitled to integration credit for a purportedly participating principal whose outside activities cast substantial doubt on whether the proposed integration is likely to be effectuated. *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969); *see also Virgil L. Pearman*, 5 FCC Rcd 5697, 5699 (Rev.Bd. 1990), *recon. granted on other grounds*, FCC 90R- 115, released December 4, 1990; *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986), *review denied*, 3 FCC Rcd 2525 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-986 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987) (subsequent history omitted). Thus, where the integration proposal conflicts with simultaneous commitments, the applicant has an affirmative burden to establish the reliability of his or her integration pledge by indicating how the other activities will be eliminated or curtailed to effectuate the commitment to the station. *Knoxville Broadcasting Corp.*, 103 FCC 2d at 680-683; *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5561 (1990). *See also Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5754 n. 13 (1990).

9. Here, we agree with the ALJ that no credit can be awarded to Tucker in light of Ms. Tucker's apparent simultaneous SBA Sec. 8(a) contractual obligations. Although she testified she would resign from TAI (Tr. 365), as well as refrain from consulting with that firm, it is doubtful, in light of the following letter from the New Orleans SBA District Counsel, that she could be permitted to do so, and still remain in full compliance with SBA requirements. The SBA letter reads in pertinent part:

> While it is clear that all 8(a) firms must be in strict compliance with our regulations while that firm is active within the program, it is not quite clear as to whether or not that same firm is strictly bound by our regulations once it graduates from the 8(a) program. Tucker & Associates is scheduled to graduate as an 8(a) concern in October of 1990. So the question now presented is whether or not Bob Tucker and/or his wife, Janee Tucker, must continue in the full time employment of TAI as required by our regulations, 13 C.F.R. 124.104.
>
> While there are no past legal and/or administrative precedences of which I am aware which deal directly with the requirement of full time employment on an 8(a) firm which has graduated and which 8(a) firm continues to perform on a contract that was awarded prior to the graduation date, there seems to be a possible answer in Parts 13 C.F.R. 124.317 and 124.318 which states that an 8(a) contract (included its options) awarded on or after October 1, 1989 shall be performed by the 8(a) concern which was originally awarded the contract.
>
> Regulations Part 13 C.F.R. 124.318(b) presents a situation whereby an 8(a) firm which has graduated from the program will be allowed to exercise certain contract options under the previously awarded con-

> tract in spite of the fact that that firm after its graduation because of its growth became large business and, therefore, was technically unable to comply with certain size standard regulations which were applicable to the firm during its original program term.
>
> Therefore, following the graduation of TAI from the program, *in spite of the fact that TAI may technically be in violation of our regulations because of a lack of full time employment status by Bob and/or Janee Tucker, it is my opinion that as long as both Bob and Janee Tucker remain the majority stockholders, principal directors and officers of TAI, and as long as they are able to retain effective and sufficient control over the business operations of TAI to the exclusion of all others*, their failure to continue as "full time" employees of TAI would probably not be a basis upon which the Agency would terminate the present 8(a) contract upon which TAI is performing for the Department of Energy.

May 29, 1990 Letter from Alan J. Wells, New Orleans SBA District Counsel (emphasis added) (Official Notice taken).[3] It is undisputed that TAI's government contracts extend well beyond TAI's October 1990 graduation date. Thus, it is clear that, despite Ms. Tucker's testimony to the contrary, the Tuckers would still be required to "retain effective control" over TAI "to the exclusion of all other employment activities."

10. In *Knoxville Broadcasting Corp.*, 103 FCC 2d at 682, which, as here, involved a SBA Sec. 8(a) contractor, we underscored the fact that there was "clear documentary evidence reflecting two mutually exclusive fulltime personal management pledges to two different federal agencies in order to secure very special and valuable privileges from both agencies." Based on the conflicting obligations, as well as the Knoxville principal's "unfulfilled commitment of "fulltime," "day-to-day," "personal supervision of [his] SBA federal contract businesses," the Board voiced its lack of confidence that the principal "would show any greater honor to his FCC pledge of 'fulltime,' personal management of CCT's communications business than he did to that virtually synonymous pledge made to the SBA with respect to his stewardship of [his minority firm]"; thus, we denied the applicant any quantitative integration credit. Although Tucker would distinguish *Knoxville* from the instant case merely because there was a shorter duration from TAI's graduation date than that of the Knoxville applicant's firm, we discern no legal distinction between the cases because TAI's contracts extend far beyond the October 1990 graduation date. Thus, we find *Knoxville* controlling for denying Janee Tucker her 50% integration credit. *See also Washoe Shoshone Broadcasting*, 3 FCC Rcd at 3952 (no credit where integration pledge conflicted with restaurant franchise agreement). Because Tucker cannot prevail comparatively, even if awarded 50% integration credit for Mr. Tucker's participation, *see Van Buren Community Service*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981) (qualitative attributes of participating owners cannot overcome a clear quantitative difference), we need not reach the question whether it was error for the ALJ to deny Mr. Tucker integration credit on his testimony that he would remain at TAI until the station was operational. Similarly, we need not address Tucker's qualitative enhancements, as urged by Tucker, since they are only pertinent if the applicant is awarded 100% quantitative integration credit.[4]

SWAN BROADCASTING LIMITED

11. Swan, awarded 100% quantitative integration credit by the ALJ, is a limited partnership, comprised of one general partner, Marian M. Vaccari, and two limited partners, Harold and Marilyn Erbs. I.D., para. 3. Vaccari owns 70% of the equity, and she proposes to work full-time as the facility's general manager. *Id.* The limited partners are prohibited by the limited partnership agreement from participating in the business of the partnership. *Id.*, para. 18 and n. 4.

12. Under well-settled Commission precedent, quantitative integration credit is generally awarded based on the "voting" ownership that is proposed full-time in station management. *See V. O. B. Incorp.*, 5 FCC Rcd 5872 (Rev. Bd. 1990). "Ownership interests held by passive investors are deemed inconsequential for integration purposes, because 'as passive investors [they] have no authority to control the licensee'". *Id.*, at 5872, *quoting Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981). Where "limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision- making process . . . the Commission disregards the applicant's formal ownership structure and treats the nominally passive owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant - and thus relevant to the Commission's integration analysis." *Coast TV*, 4 FCC Rcd 1786, 1787 (1989). *See also Royce International Broadcasting, supra*, FCC 90-390, released November 27, 1990. However, the role played by passive investors in the formation of an applicant is not necessarily dispositive of whether the applicant will secretly be managed by its passive investors. *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988). The test for analyzing the *bona fides* of an applicant's integration proposal is the totality of the record. *See Metroplex Communications Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989) (subsequent history omitted).

13. Swan's competitors challenge the *bona fides* of Vaccari's integration proposal and except to the 100% quantitative integration credit awarded Swan. In support, they contend that Vaccari is currently unemployed and has no significant business employment; that she has no broadcast experience; that she possesses a lack of familiarity concerning her management participation; and that she has previously relied upon limited partner Harold Erbs, who, they argue, will in most likelihood be involved in the management of the proposed station (contrary to his nominal status as a passive investor). They also argue that Erbs initially informed Vaccari of the availability of the broadcast channel, introduced her to communications counsel, and himself is presently in the communications business (*i.e.*, a licensee of several common carrier microwave facilities).

14. *Discussion re*: *Swan*: Initially, the contentions concerning Vaccari's lack of employment and broadcast experience, standing alone, provide no conclusive basis for undermining Vaccari's integration proposal. Her current unemployment is not pertinent to whether she could effectuate her proposal. And, as Swan notes in its Reply Exceptions (at 7), there is no record support for the claim

she has no significant business experience. She testified that she was on the Board of Directors of the Leevak Corporation, an offshore supply, shipyard and marine business, and was involved in public relations and represented the company at trade shows. *Id. See also* Tr. 50-51. Similarly, a lack of broadcast experience, by itself, has never been equated with an inability to effectuate an integration proposal, *see Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951 (Rev. Bd. 1982), since it could discourage qualified newcomers to broadcasting and confers only an initial advantage. *Policy Statement*, 1 FCC 2d at 396. With respect to her alleged unfamiliarity with management participation, this argument was persuasively answered by the ALJ (I.D., para. 14):

> Delta and Crescent urge that Ms. Vaccari's promise should not be credited because she has little understanding of her role at the station, with no clear idea of how she plans to be involved in any particular aspect of the management. Their arguments are not supported by the record. Ms. Vaccari, as the foregoing conclusions demonstrate, spelled out in some detail her role at the station. Delta and Crescent rely on transcript page 31 where Ms. Vaccari said she did not know exactly how she would be involved with any particular department. The import of the question appears to contain an expectation that Ms. Vaccari should provide details about how she would act on a day-to-day basis. A few pages earlier in the transcript she explained her role when she was asked her duties, Tr. 27-28; she added further specificity as the questions became more pointed, Tr. 29, and she explained that she had even given some thought to what type of programming the station would carry. Tr. 30. The question which Delta and Crescent cite was unanswerable because it was too vague; it certainly would not form a basis for discrediting Ms. Vaccari's promise.

And, with regard to the alleged future intrusion by passive investor Erbs, the totality of the evidence leaves no "fundamental uncertainty" about the true nature of Swan's organizational structure which would justify discounting Swan's integration proposal. *Royce International Broadcasting, supra.* In this regard, we agree with the ALJ's reasoning (I.D., paras. 17-18):

> Ms. Vaccari did learn about her counsel, Leo George, from Mr. Erbs. Tr. 64. And it was Mr. Erbs who initially told her about the availability of the New Orleans' channel. Tr. 53. Ms. Vaccari explained that Mr. Erbs helped her with her financial statement when her spouse died. She asked him if he could find her something she could be active in in New Orleans. *Id.* She has known Mr. Erbs since about 1954. From 1987 to the present, Ms. Vaccari stated, she has met with Mr. Erbs about three times and she talks with him on the telephone twice a month. Those conversations have involved "very little" about Channel 20, she said; they are mainly about her financial investments, for which she pays him a fee for his advice, or about personal and social matters involving their families. Tr. 66-67.
>
> While Mr. Erbs does provide Ms. Vaccari with financial advice in other areas, he provides advice when paid a fee. There is no evidence that he will have a similar arrangement with her if Swan operates Channel 20. Ms. Vaccari holds 70% of Swan's equity and she lives in New Orleans while Mr. Erbs lives in Houston, Texas and shares 30% equity with his spouse. There is no evidence that Mr. Erbs has an interest in operating a business in New Orleans and Ms. Vaccari appears well suited to operate one there. She is, after all, shouldering most of the financial risk. Mr. Erbs and his spouse hold a small interest and could not expect to direct the affairs of the partnership, even if they were not prohibited from such participation by the partnership agreement.

In sum, the record provides an insufficient legal basis for discrediting Swan's integration proposal.[5] *Coast TV*, 5 FCC Rcd at 1787. And, as will be discussed *vis a vis* Delta, Swan will also receive qualitative enhancements sufficient for it to prevail in this proceeding.[6]

DELTA BROADCASTING

15. Both Swan and Delta were awarded 100% quantitative full-time integration credit by the ALJ. Delta, like Swan, is a limited partnership, with one general partner, John G. Curren, Jr., who proposes to work full-time as the general manager of the station. In concluding that Delta was qualitatively superior, the ALJ noted (I.D., para. 33):

> Mr. Curren has lived [in New Orleans] approximately 34 years and Ms. Vaccari has lived in the community for about the last ten years. Mr. Curren's essentially lifetime local residence warrants a greater preference because it indicates a "likelihood of continuing knowledge of changing local interests and needs." *See Colonial Communications, Inc.*, FCC 90R-20, Review Bd. released March 30, 1990, at ¶ 8. Ms. Vaccari receives a preference for her female status because of the impact that will have on the diversity of programming in the community. Mr. Curren is entitled to credit for his 22 years in broadcasting, much of which is local. Ms. Vaccari's female preference is not given as much weight as local residence and when Mr. Curren's much longer residence is combined with his broadcast experience, Delta is to be slightly preferred over Swan.

16. Swan initially objects to the predicate underlying Delta's local residence preference (*i.e.*, Curren's "lifetime" local residence), arguing that the record demonstrates that Curren is actually no more than a "periodic" resident of New Orleans. It claims that any local residence credit that Delta may be entitled to is more than offset by Vaccari's continuous decade-long local residence. Swan argues that the decisional factor then becomes Vaccari's female status, which, Swan asserts, is entitled to greater weight than a preference for past broadcast experience.

17. *Discussion*: The Commission looks to the qualitative attributes of the integrated principals where the applicants have virtually equal quantitative integration proposals. See generally *McClenahan Broadcasting, Inc.*, FCC 90R-113,

released December 4, 1990. These attributes include local residence, civic participation, minority ownership, female ownership, and past broadcast experience. *See generally Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 (1989). The enhancing factors are not accorded equal weight. *See McClenahan Broadcasting, Inc., supra.* With respect to the attributes pertinent here, local residence is entitled to the greatest weight. *Id.* And, under this enhancing factor, continuous long-time local residence warrants more weight than does local residence of a much shorter duration. *Ronald Sorenson*, 5 FCC Rcd 3144, 3145 (Rev. Bd. 1990); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984) (subsequent history omitted); *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 123 (Rev. Bd. 1980). Participation in local civic activities, which is given credit because it similarly indicates a knowledge of, and interest in, the welfare of the community, *see Policy Statement*, 1 FCC 2d at 396, is accorded less significance than local residence, *see Radio Jonesboro, Inc.*, 100 FCC 2d 941, 948 (1985). Credit is also bestowed for female ownership. *See generally William M. Piner*, 4 FCC Rcd 5100 (1989). Female ownership, however, has less significance than local residence. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd at 5066. Past broadcast experience is deemed of minor significance. *Policy Statement*, 1 FCC 2d at 396.

18. Applying the above principles to the instant case, we agree, at the outset, with Swan's contention that Delta's local residence was accorded too much weight, since Curren's residence was not continuous. Although Curren was born in New Orleans, he left at approximately age 18 to serve in the United States Navy. Delta Exh. 2. We have previously observed that childhood residence, by itself, does little to further one's knowledge of, or appreciation for, the needs and problems of the service area. *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 187 (Rev. Bd. 1986) (subsequent history omitted). *Compare Jarad* with *Ronald Sorenson*, 5 FCC Rcd at 3145 (credit heightened where residence was unbroken). And, after serving in the Navy from 1959 through 1962, Curren attended college at Hattiesburg, Mississippi until 1968. *Id.* Subsequently, from 1976 through 1981 and from 1985 until 1986, he was employed in Texas and South Carolina. *Id.*

19. We reject Delta's contention that Curren is entitled to credit for the years he was absent from New Orleans, since his presence elsewhere did little to further his knowledge of the needs and problems of New Orleans. Further, in contrast to Curren's "periodic" past residence, Vaccari is entitled to credit for continuous local residence in New Orleans (although not from 1979 as claimed by Swan). *See* Swan Exh. 2. From 1979 until January 1981, Vaccari was institutionalized at various New Orleans psychiatric facilities as a result of a felony conviction (from which she was later pardoned).[7] Although she was able to leave the hospital during the day, and for overnight stays on weekends, it was not until January 1981 that she was ultimately released. *Id.* Delta would deny her credit for local residence during the period prior to her pardon (which occurred in March 1985), but it is clear that, in light of her involvement in local activities with the New Orleans Chapter of Alcoholics Anonymous shortly after her release from the hospital, she was a fully participating New Orleans resident after her release. Hence, she is entitled to local residence credit commencing in January 1981. In sum, weighing Curren's longer but intermittent local residence against Swan's shorter continuous residence (since January 1981), we find that Delta is entitled to a plus factor over Swan on local residence.

20. Were the local residence factor the sole difference between the applicants, Delta would be the comparative winner, *see Radio Jonesboro, Inc.*, 100 FCC 2d at 948 (even a slight difference may be decisive when greater differences do not exist); however, we are persuaded that Vaccari's superior past civic activities are sufficient to offset Delta's local residence. Vaccari has been a member of the New Orleans Chapter of Alcoholics Anonymous ("AA") since 1982, serving as the chairperson of the first study group at Loyola University, which organized seminars on the "Big Book," the text book of AA. Swan Exh. 2. The seminars, sponsored in part by the New Orleans Service Board, were designed to familiarize the New Orleans community on the disease, treatment, and recovery of alcoholism. *Id.* Vaccari has in the past served as a member of the AA Service Board in New Orleans. *Id.* Additionally, since 1982, Vaccari has been a volunteer member of the Hospital and Institute Committee, acting as a liaison to re-orient hospitalized and institutionalized patients returning to society. She speaks at meetings held at institutional facilities, and serves as a temporary sponsor for former patients, providing 24-hour assistance on an as-needed basis. *Id.* She was one of the original organizers of New Orleans' first women's alcoholic halfway house in 1984, which treats women suffering from drug and alcohol abuse. *Id.* In contrast to the impressive civic record above, the only past civic activities claimed by Delta is a cryptic reference to involvement with the Jaycees (1972-1975) and WYES-TV (1973-1977). Delta Exh. 2. This is entitled to little or no weight. *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6317 (Rev. Bd.1990) (applicant bears the burden of proof on all facets of its comparative case). Both Vaccari and Curren have been involved in various civic community activities subsequent to the filing of the applications, but those activities are entitled to only minor credit. *MTF Enterprises*, 99 FCC 2d 297, 300-301 (Rev. Bd. 1984), *review denied*, FCC 85-429, released August 2, 1985. Thus, as correctly contended by Swan, the decisional comparison between Swan and Delta is Vaccari's gender preference versus the preference for Curren's past broadcast experience. Although we are not aware of any case in which the ultimate choice rested on the ultimate weight accorded 100% female ownership versus 100% past broadcast experience, it would appear that, based on the minor weight generally accorded past broadcast experience, the Commission's policy of fostering expanded female ownership would prevail.

OTHER MATTERS

21. In its application, Swan reported that Vaccari had pled guilty to a charge of manslaughter in New Orleans, from which she had subsequently received a full pardon from the Governor of Louisiana. Swan Application, filed July 17, 1987, at Exh. 2. More specifically, Vaccari entered her guilty plea on September 21, 1979, received a suspended three year sentence on February 25, 1980 from the Twenty-Fourth Judicial District Court, Division A, Parish of Jefferson, State of Louisiana, and was placed on active probation for a term of five years. Swan's Petition for Leave to Amend, filed November 14, 1990; Swan's Supplement and Request for Official Notice, filed November 14, 1990. Ms. Vaccari served no time in jail. A special

condition of her probation was that she be institutionalized in a psychiatric facility for three years. Following sentencing, Vaccari returned to River Oaks Hospital for a brief time (until approximately March 1980), when she became a patient at CPC Coliseum Medical Center on Coliseum Street, New Orleans, Louisiana. She remained a patient at Coliseum Medical Center until approximately May 1980. *Id.* From approximately June 1980 to January 1981, Vaccari was treated at DePaul's Hospital on Calhoun Street, New Orleans, Louisiana. *Id.* She was released from DePaul's in January of 1981. Following release, Vaccari continued to reside in New Orleans to complete her psychiatric treatment. *Id.* On March 6, 1985, Vaccari received a full pardon. *Id.*

22. Both Tucker and Delta argue that before Swan's application is grantable, further inquiry into the nature of Vaccari's felony conviction is necessary in light of the Commission's recent modifications to its policies regarding character qualifications. *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990). In its original *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-179 (D.C. Cir. June 11, 1987), the Commission expressed concern with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." 102 FCC 2d at 1190-91. The Commission there held that it would consider only adjudications involving fraudulent representations to government bodies, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations. *Id.*, at 1195-1197, 1200-1203. In its most recent pronouncement, the Commission broadened its approach to consider any conviction for misconduct constituting a felony. 5 FCC Rcd at 3252.

23. In the case at bar, however, we are not persuaded that further inquiry into this matter is mandated by the new modifications to the Commission's character policies or is warranted by the facts. Initially, we note that, despite the seriousness of the offense, Vaccari was never incarcerated in a penitentiary (which one might reasonably infer would indicate a lack of "propensity to comply with the law generally"); instead, she was placed on active probation, specifically conditioned on her receipt of psychiatric treatment. She underwent such treatment, apparently until the appropriate authorities were satisfied she could safely be released, and subsequently received a full pardon. And, during this period, Vaccari actively participated and assisted in local community programs to re-orient other hospitalized and institutionalized patients returning to society, *see* paras. 19-20, *supra*. The Commission's concern is not violations of laws or other misconduct in the abstract, but rather the extent to which the misconduct provides a useful predictive judgment that an applicant or licensee will conform to FCC rules and policies. *Character Qualifications*, 5 FCC Rcd at 3252; *see also Focus Television Co.*, 98 FCC 2d 546, 549-550 (Rev. Bd. 1984) (subsequent history omitted).[8] Here, the event in question happened more than a decade ago; the principal received assistance and was granted a pardon, *see Area Wide Paging Systems, Inc.*, 46 FCC 2d 406, 407-408 (1974) (rejecting contention that non-disclosure of felony conviction required hearing, noting that pardon mooted out conviction); she has been a contributing member of society since; and no showing has been made with respect to her subsequent behavior that calls into question her basic fitness to be a Commission licensee.

CONCLUSIONS

24. All exceptions having decisional significance have been considered by the Board. No applicant is found unqualified. The only decisional comparative distinction among the four applicants is the quantitative integration credit to which each is entitled. And, as between the two frontrunners, Swan and Delta, all of their qualitative enhancements, save Swan's female ownership and Delta's past broadcast experience, offset one another. Between these latter comparative enhancement factors, the female gender preference prevails. Thus, we hold that Swan's application will best serve the public interest, convenience, and necessity.

25. ACCORDINGLY, IT IS ORDERED, That the Withdrawal of Amendment, filed May 31, 1990, as supplemented June 4, 1990, by Crescent City Broadcasting Corporation, pursuant to the Initial Decision's directive at paragraph 34, IS GRANTED; that the Joint Motion to Dismiss the Application of Crescent City Broadcasting Corporation, filed July 13, 1990, by Swan Broadcasting Limited, Tucker Broadcasting Company Limited Partnership, and Delta Broadcasting of Louisiana, Ltd., IS DENIED;[9] that the request to file reply pleading, filed August 9, 1990, by Delta Broadcasting of Louisiana, Ltd., IS GRANTED; that the petition for leave to amend, filed August 20, 1990, by Crescent City Broadcasting Corporation, IS GRANTED, and the amendment IS ACCEPTED; that the petition for leave to amend, filed November 14, 1990, by Swan Broadcasting Limited, IS GRANTED, and the amendment IS ACCEPTED; that the Supplement and Request for Official Notice, filed November 14, 1990, by Swan Broadcasting Limited, IS GRANTED; that the Supplement to Reply and Request for Official Notice, filed November 28, 1990 by Delta Broadcasting of Louisiana, Ltd. IS GRANTED; and that the partial motion to stike, filed December 5, 1990, by Swan Broadcasting Limited, IS DENIED.

26. IT IS FURTHER ORDERED, That the application of Swan Broadcasting Limited (File No. BPCT-870717KQ) for a Construction Permit for a new television station at New Orleans, Louisiana, IS GRANTED; and that the applications of Crescent City Broadcasting Corporation (File No. BPCT-880419KE), Delta Broadcasting of Louisiana, Ltd. (File No. BPCT-880419KF), and Tucker Broadcasting Company, Limited Partnership (File No. BPCT-880419KG), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Directors of non-stock corporate applicants are treated comparable to integrated owners for integration purposes. *See generally Farragut Television Corp.*, 8 FCC 2d 279, 282 (1967).

[2] Crescent argues that the ALJ erred when he denied its request for a specialized programming issue, and when he failed to award it a "diversification" preference based on the argument that it would provide a "new voice" to the community (*i.e.* the only voice owned and controlled by low and moderate income people). Both of Crescent's exceptions are denied. In rejecting the requested specialized programming issue, the ALJ correctly found that the petitioning applicant had not made the requisite *prima facie* showing for supporting the addition of an issue. Rather, Crescent's submission was little more than self-serving declarations that low and moderate groups have specific needs and interests that are not currently met by existing broadcasters. We perceive no error by the ALJ. Moreover, the typical "diversification" analysis pertains to the diffusion of control of the media of mass communications, *see Policy Statement*, 1 FCC 2d at 394-395, and thus, applicants are assessed demerits for other media interests. The ALJ found here that none of the applicants owned attributable media interests and, therefore, concluded that they were equal on the diversification criterion. An award of a "diversification" preference on any other basis is beyond the purview of our authority. *Horne*, *supra* ; *see also Julia S. Zozaya*, *supra*. In light of our affirmance that Crescent is not entitled to quantitative integration credit, and thus cannot prevail comparatively, we do not reach exceptions by Tucker that the ALJ erred in failing to add real-party-in-interest, misrepresentation and lack of candor, and reporting issues against Crescent.

[3] The content of the letter is essentially the same as an earlier letter from Wells, dated May 1, 1990, in which Tucker requested that official notice be taken. We take official notice of both letters. In this regard, we reject Tucker's exception that the ALJ erred in allowing Delta to reopen the record at the close of hearing to admit documents concerning TAI's status with the SBA. Similarly, we deny Tucker's exception that it was denied an opportunity to respond to facts adduced by Delta pertaining to TAI's participation with the SBA Sec. 8(a) program or that it should have been permitted to cross-examine the authors of the documents from the SBA. First, no one disputes that TAI is an SBA Sec. 8(a) contractor; and second, as contemplated by 5 U.S.C. §556(e), we have granted Tucker's official notice request for the May 1, 1990 letter from the SBA, clarifying SBA policy, and allowing Tucker to present its substantive defense to the adverse SBA findings. One of the signatories of the Delta submission was Wells.

[4] Although no longer decisional, we believe comment is warranted on one additional matter. We are troubled by Tucker's failure to disclose its principals' obligations to the SBA program until they were initially raised by one of its competitors after the close of the record, particularly where we had previously denied integration credit to a similarly situated applicant in an earlier decided case, *i.e.*, *Knoxville Broadcasting Corp.* Although Tucker claims that its competitors had notice earlier of the SBA relationship, by virtue of the disclosure in Tucker's written direct case that TAI provides services to the government, we are not persuaded that this constituted ample notice, nor are we as confident as Tucker that glossing over this fact was of no importance. *See Royce International Broadcasting*, FCC 90-390, released November 27, 1990 at n. 4 ("the duty of applicants to show the credibility of their proposals is fundamental to our comparative analysis"). We do not reach the question here whether the SBA non-disclosure would warrant a lack of candor issue were Tucker the preferred applicant.

[5] The parties also seek to show Erb's influence over the applicant based on a letter from an engineering firm to Harold Erbs concerning a search for an antenna site for Swan (*see* Delta Exh. 3). The letter is dated prior to the filing of Swan's application and long before the execution of the Limited Partnership Agreement, and thus would not be prohibitive *per se*. Vaccari testified that Erbs suggested to her to contact the particular engineering firm, but to the best of her knowledge, he had no other involvement in the selection of the antenna site. Tr. 39-40. We agree with the ALJ that the letter shows that Erbs had some participation in the development of the proposal, but there is no other evidence to show that Erbs was materially involved in contravention to his subsequently nominally passive status. Tucker also contends that an additional basis for discrediting Swan's integration proposal is that its Limited Partnership Agreement was not signed by all of its partners by the "B" cut-off date, *i.e.*, June 3, 1988. It notes that the residences of the general partner and limited partners are New Orleans, Louisiana, and Houston, Texas, respectively, and argues that there is no practical way the limited partners could have signed on the same day as the general partner. Even assuming, *arguendo*, that the Agreement had to be signed by the June 3 "B" cut-off date, *but see Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988) ("current Commission precedent does not require written documentation of an applicant's ownership structure on the B cut-off date"), Swan explains in its Reply Exceptions (at 6) that there is no mystery about the execution of the Agreement in two different cities since the Agreement states that it may be executed in any number of counterparts, and the agreement was indeed so executed. We deny Tucker's exception. *See also* I.D., para. 19.

[6] In light of our disposition, we do not reach those exceptions that challenge the quantitative integration credit awarded Delta. We note, however, that all of Delta's competitors claim that the ALJ erred in failing to add financial certification and financial qualifications issues against Delta. Delta's John Curren testified at hearing that Delta's cost estimate for putting the proposed facility into operation is between $2.25 and $4 million. Tr. 158. Subsequently, in an opposition filed February 6 and supplemented March 16, 1990, to an enlargement motion seeking financial and related issues, Delta attached the declarations of Curren and his step-father, John J. Richards, upon whom Delta was purportedly relying to establish its financial qualifications. Curren's declaration refers only to funds of $2.5 million, while Richards, in his declaration, avers that it had been his "intention to assist by helping to raise the required funds with the understanding that any loan obtained through my assistance would also be personally guaranteed by Mr. Curren and secured by a first security interest in the physical assets of the station." No mention is made by Richards that he would or could provide Delta with the requisite funds from his personal liquid assets. Where an applicant relies upon a potential loan from a lending institution, the Commission requires that the bank have a "present firm intention to make [the] loan future conditions permitting." *Merrimack Valley Broadcasting Inc.*, 82 FCC 2d 166, 167 (1980). *See also Scioto Broadcasting*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990) for the type of showing necessary for establishing reasonable assurance. Here, it appears that a bank was never even approached. Accordingly, a substantial and material factual question has arisen regarding Delta's finances, which would necessitate a remand on appropriate issues were Delta to prevail here.

[7] Swan's Supplement and Request for Official Notice, filed November 14, 1990; Delta's Reply and Request for Official Notice, filed November 27, 1990. Official Notice of both submissions granted. 5 U.S.C. § 556(e). The parties were directed at oral argument to submit the records relating to the duration of

Vaccari's hospitalization. Tr. 419-420. Both Delta and Swan submitted the information. Although the parties were unable to stipulate as to the significance that should be accorded the factual data, the data itself is not disputed.

[8] *See also Alessandro Broadcasting Co.*, 99 FCC 2d 1, 11 n. 13 (Rev. Bd. 1984) (refusal to impose demerit on applicant whose 70% principal had been convicted of second degree murder. No predictive nexus between his past crime and his current and future fitness to be a Commission licensee in light of fact that the crime was an isolated event that occurred in the remote past, and the state authorities connected with his conviction, imprisonment, parole, and release determined officially that principal was rehabilitated and had civil rights restored), *review denied*, 85-334, released June 28, 1985, *aff'd sub nom. New Radio Corp v. FCC*, 804 F.2d 756 (D.C. Cir. 1986).

[9] Crescent's competitors contend that Crescent's application should be dismissed for transferring 50% of its ownership to an individual who was not a party to its original application. In his I.D., the ALJ directed Crescent to file an amendment which would reinstate its control as it had been on the date for amendments as of right. Crescent has duly complied with the ALJ's directive.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RELIGIOUS	**MM Docket No. 83-911**
BROADCASTING	**MM Docket Nos. 83-914 to 83-916**
NETWORK	**MM Docket No. 83-919**
San Bernardino,	**MM Docket Nos. 83-921 to 83-923**
California	**MM Docket No. 83-925**
et al.	**MM Docket No. 83-928**
	MM Docket No. 83-930

For Construction Permit
For New Television Station

ORDER

Adopted: December 21, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. By *Memorandum Opinion and Order*, 5 FCC Rcd 6362 (Rev. Bd. 1990), and pursuant to 47 CFR § 73.3525 and 47 U.S.C. § 311(c) (as amended), the Board approved a universal settlement in the above-captioned proceeding, granted the application of Sandino Telecasters, dismissed the withdrawing applicants, and terminated this proceeding.

2. Now before the Board is a mailgram ("letter pleading") of December 14, 1990, from one Cal E. Burton,[1] presumably a principal of A & R Broadcasting Company. Therein it is alleged, in essence, that Burton was unaware of, and did not consent to, the settlement agreement approved by the Board, notwithstanding that the settlement was signed by Dr. Herbert Avery as General Partner of A & R, and submitted formally to the Board by A & R counsel. [2] Burton therefore asserts that the Board's action was *ultra vires* and it demands, *inter alia*, "that the FCC and Menshulam Riklis-Sandino Telecasters ceased and desist [sic] on the approval and transaction until all elements of this settlement have been revealed and reviewed by all parties."

3. We will dismiss the Burton missive. First, it is well-established "that the letter form of pleading employed is not contemplated by the Commission's Rules." *Belo Broadcasting Corp.*, 44 FCC 2d 534, 537 (1973).[3] Second, and more pertinent, the Board terminated this proceeding by *Order* released publicly on October 31, 1990. It no longer has jurisdiction over this proceeding, *see* 47 CFR § 1.102, [4] and a tribunal without jurisdiction, always a threshold inquiry, has no option but to dismiss. *See National Black Media Coalition v. FCC*, 760 F.2d 1297 (D.C. Cir. 1985) (opinion by Scalia, J.). [5]

4. ACCORDINGLY, IT IS ORDERED, That the pleading by Cal E. Burton, dated December 14, 1990, and received by the Review Board on December 18, 1990, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Although the mailgram purports to be from Cal E. Burton, the telegram form itself appears to indicate that the originator of the missive to Western Union was one Sharon Fletcher, 5440 Garth Avenue, Los Angeles California. Because, from the face of the mailgram itself, it appeared that not all of the captioned parties were served with a copy of the missive (only two or three, at most), the Board by Memorandum of December 19, 1990, referred the original of the mailgram to the Commission's Managing Director pursuant to 47 CFR § 1.1212(c) (*ex parte* rules).

[2] Supplement to Joint Requests For Approval of Settlement Agreements, filed jointly (per counsel of record) by Sandino Telecasters and A & R Broadcasting, October 5, 1990 (Declaration of Dr. Herbert Avery).

[3] *See also Catoctin Broadcasting Corp. of New York v. FCC*, No. 89-1552 (D.C. Cir. Dec. 18, 1990) (judgment and memorandum), disregarding entirely letter of licensee principal (letters of October 18, 1990 from Henry R. Serafin to Circuit Court Judges) and addressing only formal pleadings of counsel.

[4] Even were the Board to regard the Burton mailgram as in the nature of a petition for reconsideration, the period for filing such a petition expired on December 3, 1990. 47 CFR § 1.106(f).

[5] *But see CSJ Investments*, FCC 90-367, released November 16, 1990, where despite agreement that the Board lacked threshold jurisdiction, the Commission set aside the Board's dismissal of a pleading, and suggested that it instead "certify" the matter to the Commission "which has jurisdiction over actions by all subordinate officials." *Id.*, at para. 4; *see also id.*, n.4 (misdirected pleadings should be forwarded to "appropriate official").

Although we believe that the Board's *Order* terminating this proceeding has become final, *see* 47 CFR § 1.102, and certainly that the 30-day period for filing an application for review of the Board's *Order* has expired as well, *id.*, § 1.115(d), we shall, *ex abundanti cautela*, refer this matter to the Adjudication Division, Office of General Counsel, which is the office to which appeals of Board action are directed for initial scrutiny. *See id.*, § 0.41(p).

(As indicated in note 1, above, and because the Burton mailgram appeared on its face to be *ex parte*, the Board has referred the original (docket-associated) missive to the Managing Director. Should the Office of General Counsel be unable to secure a copy of the mailgram from the Managing Director, it may obtain a copy from the Board, or inspect the Board's copy at its offices. *See generally WWOR-TV*, 5 FCC Rcd 6261, 6264 n.4 (1990)).

[6] Pre-publication copies of this dismissal have been made available, on the adoption date, to counsel of record for all parties captioned in our prior orders. A pre-publication copy of this dismissal order had also been mailed by the Board to the mailgram originator, Sharon Fletcher (*see supra* note 1), as no other address appears on the mailgram.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-137

In the Matter of

Amendment of Section 73.202(b),	RM-7095
Table of Allotments,	RM-7106
FM Broadcast Stations.	
(Morris and Pontiac, Illinois)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 12, 1990; Released: January 4, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 1761 (1990), issued in response to two separate petitions for rule making. Nelson Enterprises, Inc. ("Nelson") proposed the allotment of Channel 276A to Morris, Illinois, as a second local service. In order to accomplish the allotment at Morris, Nelson also requested the substitution of Channel 229A for Channel 276A at Pontiac, Illinois. Livingston County Broadcasters, Inc. ("WJEZ") licensee of Station WJEZ(FM), Channel 276A, Pontiac, Illinois, requests the substitution of Channel 229A for Channel 276A at Pontiac, Illinois, and modification of the license for Station WJEZ to specify operation on Channel 229A. Nelson and WJEZ filed supporting comments restating their intentions to apply for the respective channels, if allotted. Goodrich Broadcasting, Inc. ("Goodrich"), filed a counterproposal requesting the allotment of Channel 277B1 to East Peoria, Illinois, and the substitution of Channel 287A for Channel 277A at Spring Valley, Illinois, contingent on the substitution of Channel 229A for Channel 276A at Pontiac, Illinois.[1] Jerry Rosalius ("Rosalius") filed a counterproposal seeking the allotment of Channel 277A to Gilman, Illinois, contingent on the substitution of Channel 229A at Pontiac, Illinois.[2] Neither proposal will be considered in this proceeding.

2. We believe the public interest would be served by substituting Channel 229A for Channel 276A at Pontiac, Illinois, and the allotment of Channel 276A to Morris, Illinois. As indicated in the *Notice*, Channel 276A can be allotted to Morris, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.2 kilometers (5.1 miles) southeast, in order to avoid a short-spacing to Station WVVX(FM), Channel 276A at Highlands, Illinois. Channel 229A can be substituted for Channel 276A at Pontiac, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction 2.2 kilometers (1.4 miles) east at Station WJEZ's currently licensed site. [3] As proposed, we are modifying the license of Station WJEZ(FM) to specify Channel 229A in lieu of Channel 276A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 19, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Morris, Illinois	276A, 284B
Pontiac, Illinois	229A

4. The window period for filing applications for Channel 276A at Morris, Illinois, will open on **February 20, 1991,** and close on **March 22, 1991.**

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WJEZ(FM), Pontiac, Illinois, IS MODIFIED to specify operation on Channel 229A in lieu of Channel 276A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WJEZ(FM)'s license, BLH-4485, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Station WJEZ(FM)'s license, BLH-4485, except for the channel as specified above and a license application (FCC Form 302/341) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau.

FOOTNOTES

[1] A Commission engineering analysis indicates that, using the coordinates specified in the construction permit (BPH-880505MQ) for Station WAIV(FM), Channel 277A, Spring Valley, Channel 287A would be short-spaced to the site specified in

the construction permit for Station WCFL(FM), Channel 284B, Morris, Illinois. Station WAIV(FM), therefore, would have to relocate its transmitter site. It is Commission policy not to require a station to involuntarily relocate its transmitter site. *See North Charleston, South Carolina*, 47 Fed. Reg. 10560, published March 11, 1982. Goodrich failed to include a statement from the Station WAIV(FM) permittee indicating its consent to the proposed channel substitution. Therefore, Goodrich's counterproposal is dismissed as unacceptable for consideration.

[2] Rosalius' proposal cannot be considered as a counterproposal, since there is no conflict between his request and those of Nelson and WJEZ. Rosalius' proposal, however, will be accepted as a petition for rule making (RM-7576) and will be the subject of a separate *Notice of Proposed Rule Making*.

[3] The coordinates for Channel 276A at Morris, Illinois, are North Latitude 41-18-39 and West Longitude 88-22-08. The coordinates for Channel 229A at Pontiac, Illinois, are North Latitude 40-52-31 and West Longitude 88-36-11. Since these allotments are made as a result of petitions filed prior to October 2, 1989, the Pontiac licensee and applicants for Channel 276A may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-628

In the Matter of

Amendment of Section 73.202(b), RM-7576
Table of Allotments,
FM Broadcast Stations.
(Gilman, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1990; Released: January 8, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jerry Rosalius ("petitioner") requesting the allotment of Channel 277A to Gilman, Illinois, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by this proposal since it could provide Gilman with its first local FM channel. A Commission engineering analysis has determined that Channel 277A can be allotted to Gilman in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.3 kilometers (5.2 miles) south of the community.[1] The site restriction is necessary in order to avoid short-spacings to Station WFXF(FM), Channel 277B, Indianapolis, Indiana, and a construction permit for Station WAIV(FM), Channel 277A, Spring Valley, Illinois. We note that the allotment of Channel 277A at Gilman is contingent on the substitution of Channel 229A for Channel 276A at Pontiac, Illinois, in MM Docket 90-137. We have substituted the Pontiac channel in a *Report and Order* adopted simultaneously with this *Notice*. Therefore, the grant of a license at Gilman will be delayed until the license grant occurs at Pontiac on Channel 229A.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Gilman, Illinois	--	277A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 25, 1991,** and reply comments on or before **March 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerry Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-41-45 and West Longitude 88-00-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
Television Broadcast Stations.
(Various Locations)

ORDER

Adopted: December 19, 1990; Released: January 4, 1991

By the Chief, Policy and Rules Division:

1. This *Order* amends Commission Rule 73.606(b), the Television Table of Allotments, to conform the Television Table to reflect the communities to which the listed channels are authorized. The Commission ordered this action in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, FCC 90-374, adopted November 8, 1990, and released November 30, 1990. The attached Appendix lists the communities and channels affected by this action.

2. This action constitutes an editorial change in the Television Table of Allotments. Therefore, a public notice and comment proceeding is unnecessary. 5 U.S.C. 553(b)(A) and (B).

3. For further information regarding this *Order*, contact Michael Ruger, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

The Television Table of Allotments will be amended at the following communities and channels. In each instance, the Table will reflect the community to which the channel is authorized, rather than the community currently listed in the Table.

Community Named in Table	Authorized Community	Channel
Andalusia, AL	Dozier, AL	* 2-
Birmingham, AL	Homewood, AL	21-
Munford, AL	Mount Cheaha, AL	* 7-
Fairbanks, AK	North Pole, AK	4+
Batesville, AR	Newark, AR	*17
Fresno, CA	Clovis, CA	43
Fresno, CA	Sanger, CA	59
Los Angeles, CA	Norwalk, CA	9
Riverside, CA	Ontario, CA	46
San Francisco, CA	Oakland, CA	2+
Santa Ana, CA	Huntington Beach, CA	*50-
Tulare, CA	Visalia, CA	26+
Boulder, CO	Broomfield, CO	*12
Washington, DC	Arlington, VA	14-
West Palm Beach, FL	Palm Beach, FL	61
Savannah, GA	Hardeeville, SC	28-
Monroe, LA	West Monroe, LA	14-
Monroe, LA	West Monroe, LA	39+
Lewiston, ME	Poland Spring, ME	8-
Portland, ME	Biddeford, ME	*26-
Boston, MA	Cambridge, MA	56
North Adams, MA	Adams, MA	19
Middleton, MA	Lawrence, MA	62
Worcester, MA	Marlborough, MA	66
Bay City, MI	University Center, MI	*19+
Parma, MI	Onondaga, MI	10-
Biloxi, MS	Gulfport, MS	25-
Columbus, MS	West Point, MS	27
Boulder City, NV	Henderson, NV	5+
Hanover, NH	Hartford, VT	31
Manchester, NH	Derry, NH	50-
Manchester, NH	Merrimack, NH	60+
Little Falls, NJ	Montclair, NJ	*50+
New Brunswick, NJ	Linden-Newark, NJ	47+
Lake Placid, NY	North Pole, NY	5
Levittown, NY	Garden City, NY	*21-
Massena, NY	Norwood, NY	*18
Patchogue, NY	Smithtown, NY	67
Cincinnati, OH	Newport, KY	19+
Cleveland, OH	Shaker Heights, OH	19
Elk City, OK	Sayre, OK	8+
North Bend, OR	Coos Bay, OR	11
York, PA	Red Lion, PA	49+
Vega Baja, PR	Naranjito, PR	64
Watertown, SD	Florence, SD	3-
Richardson, TX	Garland, TX	23
Temple, TX	Belton, TX	46-
Fredericksburg, VA	Goldvein, VA	*53
Beckley, WV	Oak Hill, WV	4
Colfax, WI	Menomonie, WI	*28-

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

GE AMERICAN COMMUNICATIONS, INC. Application for Orbital Reassignment of Satcom 1R	File Nos. 65-DSS-ML-90
GE AMERICAN COMMUNICATIONS, INC. Application for Temporary Assignment of Satcom C-1	64-DSS-MISC-90
ALASCOM, INC. Application for Temporary Assignment of Aurora 2	1-DSS-MISC-91

ORDER

Adopted: December 28, 1990; Released: January 4, 1991

By the Domestic Facilities Division:

I. BACKGROUND

1. GE American Communications, Inc. (GE Americom) and Alascom, Inc. (Alascom) have filed three related applications pertaining to their Satcom and Aurora domestic fixed-satellite systems. In the first, GE Americom requests authority to relocate its in-orbit Satcom 1R satellite from 139^0 W.L. to 131^0 W.L. In the second, GE Americom requests authority to operate its recently launched Satcom C-1 satellite at the vacated 139^0 W.L. location on a temporary basis. In the third, Alascom requests authority to test its Aurora 2 satellite at 136^0 W.L. for an eight-week period when the satellite is launched in mid-1991. Hughes Communications Galaxy, Inc. (HCG) filed comments with respect to GE Americom's applications. For the reasons discussed below, the three applications are granted.

2. All three requests stem from the impending retirement of GE Americom's Satcom 3R satellite, which is operating at 131^0 W.L. Satcom 3R was launched in 1981 and is currently operating beyond its eight-year nominal design life. The satellite is used exclusively to distribute video programming primarily to cable television systems and, according to GE Americom, serves approximately 50 million homes. GE Americom states that the least disruptive means of maintaining programming for its customers is to move its in-orbit spare satellite, Satcom 1R, from 139^0 W.L., where it is currently operating, to 131^0 W.L. Satcom 1R would then operate at 131^0 W.L. until Satcom 3R's authorized replacement, Satcom C-3, is launched in early 1993.[1]

3. Moving Satcom 1R, however, would leave the 139^0 W.L. location unoccupied. GE Americom notes that the Aurora 2 satellite -- which is assigned to 139^0 W.L. and which will eventually serve the Satcom 1R customers -- will not be launched until mid-1991. GE Americom therefore proposes to locate its Satcom C-1 satellite, which was launched in November 1990 and is assigned to 137^0 W.L., at 139^0 W.L. on a temporary basis.[2] It states that it will move Satcom C-1 to its assigned location when Aurora 2 becomes operational. GE Americom submits that this plan is less disruptive than requiring customers to repoint their antennas twice -- once to Satcom C-1 at 137^0 W.L. and then back to Aurora 2 at 139^0 W.L. -- at a cost of approximately $1.25 million.

4. Finally, Alascom requests authority to test Aurora 2 at 136^0 W.L. before it is moved to 139^0 W.L. Alascom states that if Satcom C-1 is operating at 139^0 W.L. when Aurora 2 is launched, as proposed, testing Aurora 2 at its assigned location will prematurely and unnecessarily disrupt customers receiving service from 139^0 W.L. Alascom states that 136^0 W.L. is the most feasible location for testing Aurora 2 since it will be separated by three degrees from Satcom C-1, which will be operating on the same polarization, and two degrees from Hughes's Galaxy 1 satellite, which is cross-polarized with Aurora 2. Alascom states that Aurora 2 should be fully tested and on station at 139^0 W.L. no later than July 1991.

5. No oppositions to the proposed orbital rearrangements were filed. HCG, however, filed comments in which it alleges that the operation of Satcom C-1 from its assigned 137^0 W.L. location presents a serious potential for disrupting millions of cable television viewers on HCG's Galaxy 1 satellite. Galaxy 1 is currently operating at 134^0 W.L. although it is assigned to the 133^0 W.L. location. HCG suggests that we require GE Americom to monitor the earth station antennas transmitting to Satcom C-1 and require power reductions in their uplink transmissions, as necessary, during the transition period to HCG's next generation satellite in 1994.

II. DISCUSSION

6. Granting the GE Americom and Alascom requests will serve the public interest, convenience and necessity. No new orbital locations are involved. The proposed orbital plan and temporary assignments will allow GE Americom and Alascom to provide continued service and will eliminate the need for customers to repoint their antennas. Moreover, no party has objected to any of the relocations requested in the applications at issue. We therefore grant the requests.

7. With respect to HCG's comments, the allegations of potential interference from Satcom C-1's operations at 137^0 W.L. are not properly raised in this proceeding. Satcom C-1 was assigned to 137^0 W.L. in January 1990, after its application was placed on public notice and after opportunity for public comment.[3] HCG did not object to Satcom C-1's operations at that time. Its comments here may be considered as an untimely petition for reconsideration of that decision and dismissed on those grounds.[4]

8. In any event, HCG has not presented any potential interference concerns that warrant placing any extraordinary conditions regarding the monitoring of uplinking earth stations or other coordination requirements on Satcom C-1's license. HCG's concerns stem not from the operations of Satcom C-1 *per se*, but from problems

caused by earth station uplink transmissions into the satellite. As HCG acknowledges, "[w]ith proper power limits on the operation of small and transportable earth stations, HCG does not expect that Satcom C-1 will cause unacceptable interference into Galaxy 1."[5] HCG, however, does not provide any documentation to support its claims that earth station licensees are regularly exceeding their authorized powers or that licensed earth stations operating at higher powers are causing harmful interference.[6] As with all licensees of new satellites, it is incumbent on GE Americom to coordinate its operations with the operations of adjacent in-orbit satellites before it brings its satellite into service at 137^0 W.L. Satcom C-1's power levels fall within those levels that are routinely authorized. Other satellites are operating with comparable specifications and these satellites have been and are continuing to be coordinated among affected licensees without a special license requirement. There is no reason to believe that Satcom C-1 will not similarly be successfully coordinated with adjacent satellites without the need for Commission involvement.

III. CONCLUSION

9. Accordingly, IT IS ORDERED that Application File Nos. 64-DSS-MISC-90, 65-DSS-ML-90, and 1-DSS-MISC-91 ARE GRANTED.

10. IT IS FURTHER ORDERED that the Orbital Assignment Plan set forth in the Appendix to *Assignment of Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972 (1988), *modified*, 5 FCC Rcd 179 (1990), *further modified* in *American Satellite Company*, 5 FCC Rcd 1186 (1990), in *GTE Spacenet Corporation*, 5 FCC Rcd 1182 (1990), and in *Hughes Communications Galaxy, Inc.*, 5 FCC Rcd 3423 (1990) IS FURTHER MODIFIED to assign Satcom 1R to 131^0 W.L.

11. IT IS FURTHER ORDERED that GE Americom Communications, Inc. IS AUTHORIZED to operate Satcom C-1 at the 139^0 W.L. orbital location on the condition that the satellite be moved to its regularly assigned location of 137^0 W.L. not later than the date on which 139^0 W.L. is ready to be occupied by Alascom, Inc.'s Aurora 2 satellite.

12. IT IS FURTHER ORDERED that Alascom, Inc. IS AUTHORIZED to test Aurora 2 at the 136^0 W.L. orbital location for an eight week period after it is launched. At the expiration of this period, it must begin to move the satellite to its regularly assigned location of 139^0 W.L.

13. GE American Communications, Inc. and Alascom, Inc. are afforded thirty days from the date of release of this order to decline the authorizations as conditioned. Failure to respond within this time period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] GE Americom states that it plans to maintain Satcom 3R as a non-operational in-orbit spare.

[2] GE Americom states that it will operate Satcom C-1, which is equipped with polarization switching capability, in the vertical polarization sense while it is operating at 139^0 W.L. to conform to the C-band polarization plan at that location.

[3] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179 (1990) (Reconsideration Order).

[4] HCG states that its objections are timely because it recently learned that Satcom C-1's performance specifications are different from what HCG had understood them to be. This does not alter the procedural deficiencies of HCG's pleading. If HCG believes that GE Americom is implementing the Satcom C-1 satellite with technical specifications different from those authorized, this proceeding -- which involves only Satcom C-1's temporary assignment to 139^0 W.L. -- is not the appropriate place in which to raise these issues.

[5] HCG Response at 3.

[6] If HCG believes this to be the case in general, it is more appropriately addressed in the context of a Rule Making proceeding. The Commission will take any necessary action in the context of that proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS
COMMUNICATIONS, INC.,
Complainant,

v.

CONTEL OF VIRGINIA, INC.,
Defendant.

File No. E-91-028

ORDER

Adopted: December 14, 1990; Released: January 4, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 29, 1990, Cable & Wireless Communications, Inc. (hereinafter "CWC") filed the above-captioned formal complaint against Contel of Virginia, Inc. (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On December 6, 1990, however, CWC filed a motion for leave to withdraw the complaint with prejudice stating that the parties had entered into a formal resolution of this matter and that there was no longer any need for these proceedings.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that CWC's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review of
Liability of MTD, Inc., Permittee
of Station KWMW(FM), Maljamar,
New Mexico

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 7, 1991

By the Commission:

1. The Commission has under consideration an Application for Review of a Forfeiture Order issued by the Commission's Field Operation Bureau (FOB), pursuant to delegated authority, finding MTD, Inc., (MTD) permittee of KWMW(FM), Maljamar, NM, in violation of the Commission's tower lighting rule and imposing a $10,000 forfeiture.

2. On or about January 18, 1990, MTD completed construction of its new 923-foot tower, which is located on an aeronautical VFR (Visual Flight Rules) flyway. Pursuant to a Determination of No Hazard to Air Navigation made by the Federal Aviation Administration (FAA), MTD's construction permit (No. BPH-850712RN) granted on August 14, 1987, called for both red beacons (for night) and high intensity strobe lights (for day, with reduced power for twilight and night). Upon completion of the construction, the FAA contacted the permittee and expressed concern about the lack of high intensity strobe lighting.

3. On March 9, 1990, the FAA inspected the station and advised the Commission's Denver FOB office of the failure of Station KWMW to install the required high intensity strobe lighting on its tower. On March 12, 1990, the Denver FOB office spoke with the permittee by telephone and determined that the strobe lighting had not been installed, nor had any concrete steps been taken to provide for such lighting installation. On April 26, 1990, the Denver office issued a $10,000 Notice of Apparent Liability (NAL), citing the permittee for apparent repeated violations of Section 17.41 of the Commission's Rules from January 18, 1990, to March 12, 1990.[1] In a May 14, 1990, response to the NAL, MTD admitted the violation, but claimed it had entrusted Transmission Structures Limited (TSL), the company hired to construct the tower, to build in compliance with Commission requirements. MTD enclosed a copy of its contract with TSL with its response. The contract called for TSL to provide an FAA A-3 kit for lighting. That kit does not include the high intensity strobe lighting specified in the permittee's construction permit. On June 6, 1990, the Denver office issued a $10,000 Forfeiture Order for the tower lighting violation.

4. In its Application for Review, filed July 16, 1990,[2] MTD presents several arguments that it asserts should cause rescission of the forfeiture or mitigate the forfeiture amount. MTD states that it relied upon TSL to produce and erect a tower that complied with FAA and FCC requirements. MTD asserts that, although the FAA had "initially 'expressed concern' with the lack of strobe lighting it took no serious measures to demand immediate installation, issue warnings to aircraft, etc." MTD notes that the Forfeiture Order did not use the word "willful" to describe the instant violation and states that the FAA has subsequently determined that, with the installation of strobe lights, the red lighting on the tower may be discontinued. A request for such a modification in the construction permit has since been requested and granted. The permittee argues that the FAA "is now obviously satisfied with the tower lighting at KWMW," that it has no history of prior offenses, and that payment of a $10,000 forfeiture is unreasonable and would financially threaten the station's existence.

5. We find permittee's arguments unavailing. As to the permittee's contention that it relied on TSL, MTD has acknowledged that the station failed to have its tower lit in accordance with the construction permit. MTD's contract with a company to build its tower does not relieve MTD of its nondelegable obligation to provide the lighting specified in its construction permit. The Commission has long held licensees responsible for the negligent acts or omissions of their employees and that responsibility is not lessened when independent contractors are used. *Wagenvoord Broadcasting Company*, 35 FCC 2d 361 (1972). Additionally, as previously pointed out to the permittee in the Forfeiture Order, the contract did not call for the lighting that the construction permit required. Regarding the contention that the FAA did not demand immediate correction when it initially contacted the permittee, apparently in January 1990, such a demand is not a prerequisite to the permittee's compliance with its construction permit or to the Commission's enforcement of its rules. We note that the permittee still had taken no corrective action by the time the NAL was issued in April 1990.

6. As to the absence of citation for willfulness, Section 503(b) does not require that the NAL specifically include a finding of willfulness, so long as the behavior involved is, in fact, willful or repeated. There can be no dispute that MTD failed to light its tower as required by Section 17.41 and that its failure was willful, *i.e.*, the result of its own failure to act by constructing and lighting its tower as required by the construction permit. *Vernon Broadcasting, Inc*, 60 RR 2d 1275 (1986). [3] Accordingly, MTD was properly assessed a forfeiture for a willful violation of Section 17.41.

7. Subsequent modification of lighting requirements is irrelevant. Among other things, the construction permit required high intensity strobe lighting during the day, with reduced intensity at night. The tower as constructed contained no strobe lighting. The permittee was, therefore, not in compliance with the construction permit. It moved into compliance by installing medium intensity strobe lighting only after the FAA and the FCC agreed to modify the requirements. Furthermore, corrective action in no way dilutes MTD's liability for having failed to comply with its earlier obligation. The Commission has stated repeatedly that corrective action subsequent to notification of liability will not relieve licensees, or

permittees, of liability. *See Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Furthermore, in the instant case, corrective action of a hazardous situation was not commenced until long after construction of the tower and notification by the FAA.

8. MTD has failed to document its claimed precarious financial situation. Given the seriousness of the offense,[4] and the fact that MTD faced a potential $250,000 forfeiture,[5] it is clear that all mitigating circumstances have already been taken into account in assessing the $10,000 forfeiture.

9. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed July 12, 1990, by MTD, Inc., permittee of Station KWMW(FM), Maljamar, New Mexico, IS DENIED.

10. IT IS FURTHER ORDERED That MTD, Inc., permittee of Station KWMW(FM), Maljamar, New Mexico, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of ten thousand dollars ($10,000) for repeated violations of Section 17.41 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 17.41 reads, in part:

> Antenna structures having a skeletal tower or other main support structures over 182.88 meters (600 feet) up to and including 304.80 meters (1,000 feet) in height shall be obstruction lighted as follows:
>
> (a) There shall be installed at the top of the skeletal or other main support structure three or more high intensity light units which conform to FAA/DOD Specification L-856, High Intensity Obstruction Lighting Systems. . . .
>
> . . . .
>
> (d) All lights shall be synchronized to flash simultaneously at 40 pulses per minute. . . .

[2] Although the Application for Review was filed 10 days late, limitations on filing applications for review are established solely by Commission Rule (*see* 47 C.F.R. Section 1.115(d)) and thus can be waived. Since no other parties would be prejudiced by consideration of this Application for Review on the merits, we will waive the time limit contained in Section 1.115(d).

[3] The permittee had notice that the tower lacked the required strobe lighting as of the initial FAA inspection, which occurred upon completion of construction in January 1990.

[4] Violations of antenna lighting rules are always serious because of their potential dangers to aviation. *Radio Beaumont, Inc.*, 13 FCC 2d 965 (1968).

[5] The permittee's potential liability for the instant continuing violation is $25,000 for each day with an aggregate limit of $250,000. These limits became effective with the enactment of the Omnibus Budget Reconciliation Act of 1989, on December 19, 1989. The permittee's violation continued for more than 10 days after these liability limits became effective.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of
Special Access
Tariffs of Local
Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1990; Released: December 31, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. By its *Refund Order* [1] in this docket the Commission required that specified local exchange carriers (LECs) refund excessive special access charges occasioned by strategic pricing,[2] to the extent such refunds could be funded from excess earnings, and that the affected LECs submit reports describing their plans for implementing those refunds. The reports initially submitted have since been supplemented by further reports, by information on settlement agreements reached between LECs and some customers, and by associated comments.

2. The original refund reports submitted by LECs on March 5, 1990[3] in some respects failed to satisfy the instructions of the *Refund Order*. After a Bureau Order iterating the LECs' escrow obligations,[4] these deficiencies were addressed by supplemental LEC reports on April 10, 1990.[5] A principal issue raised by those reports was the contention by LECs that settlement agreements reached with some customers had discharged any refund obligations otherwise owed those customers, so that amounts to be escrowed could be correspondingly reduced. By letter of May 22, 1990 the Deputy Chief (Policy) of the Common Carrier Bureau requested additional information from the LECs regarding settlement agreements; by letter of May 24, 1990 the Chief, Accounting and Audits Division, requested further details of accounting treatment accorded settlements. The requirements of the May 22 letter were clarified in a Public Notice issued June 15, 1990, 5 FCC Rcd 3796, and the information supplied by the LECs on June 21, 1990 has since been included in the record with the exception of customer rosters for which some carriers requested confidential treatment. Subsequent comments on the settlement-related information were filed August 8, 1990, and reply comments were filed by the LECs August 29, 1990. *See* Public Notice, 5 FCC Rcd 5235 (1990).[6]

II. ANALYSIS AND DISCUSSION

A. Effect of Settlements

3. None of the customers LECs describe as settling parties dispute LEC claims that those customers entered into settlements that encompass any "strategic pricing" refunds those customers might receive.[7] CompTel asserts, however, that the Commission should scrutinize settlement agreements to assure that the settlements do not prejudice the rights of non-settling parties to refunds. CompTel Comments at 2-3. CompTel adds that the LEC submissions responsive to the May 22 letter from the Deputy Chief (Policy) do not eliminate the possibility that net earnings were written down on the basis of liabilities removed by settlements, and asserts with Williams that the non-settling parties placed at risk by such practices lack sufficient data on the public record to adequately review LEC practices. CompTel Comments at 4-6; Williams Comments at 4-5.

4. Southwestern Bell replies that its settlements have not and will not prejudice amounts owed to non-settling customers, and states it should not be required to issue refunds to settling customers nor to keep funds for such accounts escrowed. Southwestern Bell Reply at 2-5. BellSouth, Pacific, and US West also assert in their replies that a settlement with one customer will not reduce the refund entitlement of another customer under the factual circumstances presented here. Pacific and US West state they made no settlement-related adjustments to their Forms 492; BellSouth reiterates its earlier statement that no adjustments have been made to Forms 492 "to reflect individual carrier settlements." BellSouth Reply at 2; Pacific Reply at 2-3; US West Reply at 8-10.

5. The record in this proceeding does not suggest grounds for concern that the settlements involved here have impinged, intentionally or otherwise, on this refund process. The affected carriers assert that the earnings reported on Forms 492, on which the *Refund Order* relied, were not reduced by settlement amounts, and the staff review of supporting materials submitted by LECs on this issue in response to the May 24, 1990 letter from the Chief, Accounting and Audits Division, disclosed no deficiencies warranting further inquiry. We therefore perceive no useful purpose would be served by requiring disclosure of customer rosters or accounting entries, nor have CompTel or other commenters sought access to that information through the mechanism established by Section 0.461 of the Commission's Rules. The refund plans submitted by the LECs will provide nonsettling parties with the same refunds those customers would have received in the absence of any settlements.

B. Methodological Disputes

6. Contentions directed to the LEC refund calculations include (1) requests for further documentation of underlying data; (2) claims that the carriers' refund methodologies improperly altered excess earnings calculations. We consider these several claims below.

7. (1) *Further Documentation*. CompTel seeks disclosure of customer lists submitted by some LECs with requests for confidential treatment, and asks that LECs be required to disclose the terms of settlement agreements. *Id.* at 6-8. Williams avers that various LECs have ignored Commission reporting requirements or filed data under seal that should be disclosed, and argues that penalties should be added to refunds owed by carriers who have delayed

refund payments by withholding relevant and material data. Williams Comments at 1-5. MCI, while finding the LECs' informational submissions "basically sound in methodology and data sources," asserts that back-up material ranges from adequate (Pacific Bell) to wholly inadequate (BellSouth). MCI states that the rate adjustment factors (RAFs) or ratios used by LECs to develop refunds are themselves established by initially comparing DS1 rates that are eight times the voice grade rate with the DS1 rates actually charged, and then either multiplying the resulting ratio (i) directly against individual customer billings; or (ii) against total billings for an aggregate refund, which is then allocated between customers based on individual billing records. MCI notes that the LECs generally fail to mention the process by which their special access billing records were reviewed, and urges the Commission to require specification of RAFs used and of total DS1 billings to enable verification by comparison with data submitted by LECs in access filings. MCI Comments at 4-7.

8. Southwestern Bell characterizes MCI's reservations as extraneous, stating that it provided RAFs and associated methodology and that disbursement issues need not await Form 492 revisions. Southwestern Reply at 7 n.25. BellSouth contends MCI's criticism of its supporting data should be disregarded for generality, but asserts that RAFs and DS1 billed revenues are already included in its refund plan, and suggests that billing records in MCI's possession are a separate data source for confirming the calculations described therein. BellSouth Reply at 3-4.

9. We are not persuaded by MCI's and Williams' contentions that the BOCs have failed to supply adequate information regarding their refund methodologies. As to Williams' contentions that the carriers have ignored Commission reporting requirements, we note that (i) Ohio Bell and Wisconsin Bell submitted complete refund reports on March 5, 1990; (ii) US West submitted a supplemental escrow report April 10, 1990; and (iii) Pacific, Southwestern and US West each submitted responses to the May 22, 1990 letter request for information sent by the Deputy Bureau Chief (Policy). While Williams asserts that some LECs have filed such reports under seal "in their entirety," the only information filed with requests for proprietary treatment under 47 C.F.R. § 0.459 of the Commission's Rules are the LECs' customer lists, and this procedure was explicitly contemplated by the June 15, 1990 Public Notice, *supra* para. 2. That Notice explicitly stated that the submissions would be included in the docket record and opportunity for comment specified by a later action; the August 7, 1990 Public Notice fulfilled that undertaking. *See* para. 2, *supra*.

10. Southwestern has provided rate adjustment factors and explains their development as part of its refund plan methodology submitted March 5, 1990, and as explained at para. 5, *supra*, the data on Form 492 reports are not distorted by adjustments to reflect settlements, so that no revisions are necessary on that account prior to resolution of disbursement issues. Southwestern will, as described *infra* at para. 16, be required to revise its refund proposal in other respects. Similarly, with respect to BellSouth, the billed revenues and RAFs were supplied with BellSouth's refund plan, and in any case BellSouth will now be submitting a revised plan to comport fully with requirements of the *Refund Order*. *See* para. 15, *infra*.

11. (2) *Calculation Methodologies*. Williams contends that "fanciful interpretations" of the Commission's strategic pricing guidelines account for a "good portion" of alleged discrepancies between the Commission's *Refund Order* and refunds proposed by LEC plans. Williams specifically cites BellSouth's use of one-year periods to calculate excess earnings, and Southwestern Bell's use of projected demand and projected average length of haul rather than historical data from actual billings, as practices that operate to understate those carriers' liability compared to calculations in the *Refund Order*. Williams Comments at 6-8. More generally, Williams argues, the LECs' crossover calculations arbitrarily exclude and include significant costs: multiplexers are a vital part of HiCap configurations and multiplexer costs should be included in crossover analysis; conversely, if subelement-based crossover ratios are appropriate, consistency requires that LECs present separate crossover ratios for the Channel Termination and Channel Mileage components of their cost projections. Williams asserts that the great bulk of strategic overcharges arises in the Channel Termination rate element, and that combining that element with Channel Mileage for purposes of crossover analysis excludes the bulk of strategic overcharges from refund liability. *Id.* at 8-9.[8]

12. BellSouth replies that Williams's contentions respecting the use of one-year earnings data are meritless because the application of two-year monitoring periods in the calculation of refund liabilities in the *Refund Order* was in error, and notes that BellSouth's petition for reconsideration of the subsequent *Escrow Order* remains pending. BellSouth Reply at 4-5. Southwestern Bell replies that it calculated rate levels that would have been filed to produce the crossover ratio mandated by strategic pricing guidelines based upon prospective demand quantities, because rates the Commission believed should have been filed would have been developed on that basis. Southwestern Bell asserts that the use of prospective demand is consistent with data used to determine compliance with the *Strategic Pricing Order*,[9] and states it would be unreasonable to determine on a retrospective basis if rate levels met crossover requirements based on prospective demand but then determine rate adjustments on the basis of actual demand. Southwestern Bell Reply at 9-10.

13. As to the inclusion of multiplexer costs. Ohio Bell and Wisconsin Bell, as well as BellSouth. state that the Commission rejected this argument in its *Pricing Order Reconsideration*, so that Williams's contentions are an untimely effort to seek reconsideration. *See Pricing Order Reconsideration*, 5 FCC Rcd at 406 nn.43. 46. US West adds that the same contention was rejected when raised by AT&T in the *Annual 1989 Access Tariff Filing* proceeding. *See* 4 FCC Rcd 3638, 3693 (1989).

14. As to Williams' critique of its pricing of rate elements for crossover analysis, Southwestern replies that its use of prospective demand for crossover analysis tracks the Commission's method in the December. 1988 *Strategic Pricing Order*, and states that length-of-haul factors are irrelevant to the 1987-88 earnings period (because its refund obligation for that period is capped by overearnings) and could only minimally affect the 1985-86 period. Southwestern Reply at 10-11.

15. BellSouth's use of a one year period to compute overearnings is inconsistent with the procedures the Commission adopted for the computation of these particular refunds in the *Refund Order*. The *Refund Order Reconsideration* [10] states:

> We did not purport to identify the category overearnings "caused" by strategically priced subcategory rates and to refund that amount. We instructed the LECs to refund the *lesser* of (1) the amount by which their rates exceeded the reasonable range for HiCap services (i.e., the Voice Grade HiCap rate crossover range), or (2) their category overearnings. We could have required the LECs to refund the former amount regardless of whether that amount exceeded category overearnings and thereby forced the LECs to earn less than their authorized return for special access as a category. We chose instead to exercise our equitable discretion and limit a LEC's refund liability to category overearnings.

Refund Order Reconsideration, 5 FCC Rcd at 4862. The prior *Refund Order* used the Part 65 rate of return monitoring periods, and the Form 492 reports for those periods in order to compute the category overearnings limitation on the strategic pricing refunds. BellSouth's decision to use a different time period to compute the overearnings limitation does not comply with the *Refund Order*. We will accordingly defer all distributions from the BellSouth escrow and require BellSouth to submit a revised refund plan on or before January 14, 1991.

16. We reject Southwestern Bell's contention that it may rely on demand projections to perform its crossover analysis. The Commission's Order required carriers to calculate the amount by which customers were overcharged. That amount was defined in the Commission's Order as the difference between the DS1 rate actually charged and a DS1 rate no higher than eight times the charge for voice grade service. To determine the relevant charge for voice grade service, Southwestern Bell should have calculated a representative voice grade charge based on the average length of haul for voice grade circuits. Southwestern has offered no persuasive rationale for using projected demand to calculate average length of haul rather than the actual demand it experienced during the years at issue herein. We therefore require Southwestern Bell to file an amended refund report displaying its calculation of a DS1 crossover rate based on actual demand for voice grade service during the 1985-86 earnings period. We agree with Southwestern Bell that length of haul factors are irrelevant to calculation of its refund liability for the 1987-88 earnings period since it is already refunding all of its category overearnings, which is the maximum amount required by the Commission's Order.

17. With respect to multiplexing costs, the Common Carrier Bureau first noted in the *Annual 1989 Access Tariff* proceeding that the Commission had not directed the inclusion of LEC-provided multiplexing costs in the cost crossover calculations specified by the *Strategic Pricing Order*, and stated that AT&T's urgings for inclusion of such costs were better raised by a petition for reconsideration of that Order. *Annual 1989 Access Tariff Filing*, 4 FCC Rcd at 3693. In the subsequent *Pricing Order Reconsideration* the Commission noted that a major reason for the difference between the 6:1 crossover ratio initially adopted in the *Strategic Pricing Order* and various ratios suggested by other parties was those parties' inclusion of costs not part of the Commission's crossover analysis. *Pricing Order Reconsideration*, 5 FCC Rcd at 406 n.43. The LECs' exclusion of multiplexing costs for purposes of the crossover analysis is consistent with the Commission expectations expressed in the *Refund Order*. Williams' suggestion that multiplexing costs be included must, therefore, be rejected.

18. Williams' suggestion that the LECs should be required to perform separate crossover analyses for the Channel Termination and Channel Mileage components is also inconsistent with our understanding of the *Refund Order*. We infer from that Order that the Commission expected the LECs to perform the crossover analysis on an aggregate basis. The LECs have in fact performed such an aggregate analysis. Williams' objections to the use of an average length of haul for purposes of a crossover analysis are also inconsistent with the Commission's decision in the *Refund Order*.

19. The late-filed comments of the Telephone Communications Corporation (TCC) are also based upon the premise that LECs should not have based refund computations upon crossover ratios at the average length of haul. We believe that the Refund Order mandated the use of an average length of haul for purposes of computing these refunds. Accordingly, the TCC objection is not well founded.[11]

20. Finally, Allnet states that while some LECs attempted to justify their variance from initially calculated Commission amounts by reference to settlements with customers, Ameritech has failed to explain why its claimed liability for Wisconsin Bell is only $868,271 while the Commission determined special access overearnings for that carrier of $3,001,000. Allnet Reply Comments at 1-2. While Wisconsin Bell does not address Allnet's contention in its Reply, its original explanation in its March 5, 1990 refund plan report establishes that the reduction in DS1 billing needed to reduce Wisconsin rates to levels compliant with the 8:1 crossover standard was substantially less than the overearnings identified in the *Refund Order*. Joint Ohio Bell and Wisconsin Bell refund plan report, March 5, 1990, at 4-5. That reduction ($576,029), augmented by interest and the then-anticipated refund obligation to DDS customers (since retracted by the Commission's *Refund Order Reconsideration)*, generated the figure questioned by Allnet. The record thus provides no basis for questioning this aspect of Wisconsin Bell's proposal.

C. Termination of Escrow

21. Ohio Bell and Wisconsin Bell argue against any immediate refund disbursement, asserting that payment of refunds should be deferred pending judicial review of the *Refund Order* and *Refund Order Reconsideration*.[12] The escrow arrangements, these carriers assert, entitle LECs to a stay *pendente lite* under *Virginia Petroleum Jobbers* [13] and related precedent. Joint Ohio Bell and Wisconsin Bell Reply at 2-3. Allnet, in contrast, urges that Commission-determined refund amounts should be disbursed without delay. Allnet Reply at 1-2. Southwestern Bell, reiterating that its settlements have not and will not prejudice amounts owed to non-settling customers under refund requirements, contends it should not be required to make refunds to customers who have settled nor to escrow funds for such accounts. Southwestern Bell Reply at

2-5. BellSouth similarly avers that no purpose is served by maintaining escrow requirements for customers who have settled their claims, and US West contends there is no logical reason why a LEC should not reduce the escrow amount by settlements. BellSouth Reply at 3; US West Reply at 8-10.

22. Inasmuch as we are approving the refund plans of all carriers other than BellSouth and Southwestern Bell, we will authorize all carriers other than BellSouth and Southwestern Bell to withdraw amounts from escrow that are not allocable to refunds for nonsettling parties. Those carriers whose refund plans are approved may withdraw those amounts immediately.

23. BellSouth's refund plan deficiencies have the potential to substantially affect refund amounts, and so no reduction of its escrow can be permitted in the absence of a satisfactory refund plan. As to Southwestern Bell, a somewhat different approach is necessary. The deficiencies in this carriers' refund methodologies, noted *supra* at paras. 15-16, preclude a final determination of their actual refund pool obligation to non-settling parties. At the same time, the Bureau does not wish to penalize this carrier for its errors by the retention of an escrow obligation disproportionate to the distortions possibly introduced by the oversights. Accordingly, the portion of Southwestern's currently escrowed funds which represent its liability for the 1985-86 monitoring period and which are allocated to parties with whom Southwestern Bell has entered into settlement agreements may be reduced by 90 percent. The portion of escrowed funds which represent its liability for the 1987-88 monitoring period and which are allocated to settling parties may be removed in its entirety. Subsequent escrow reductions must await evaluation of these carriers' revised refund proposals.

24. Carriers other than BellSouth and Southwestern Bell that are not participating in pending appeals must disburse refunds to nonsettling parties within 30 days of the release of this Order. Carriers other than BellSouth and Southwestern Bell that are participating in pending appeals may keep amounts allocable to nonsettling party refunds in escrow, pending Commission action on requests for a stay pending appeal.

III. ORDERING CLAUSES

25. IT IS ORDERED that carriers submitting refund plans under the terms of the *Refund Order*, other than BellSouth and Southwestern Bell, MAY IMMEDIATELY DIMINISH ESCROWED AMOUNTS by the amounts allocable to settling parties.

26. IT IS FURTHER ORDERED that carriers submitting refund plans under the terms of the *Refund Order*, other than BellSouth and Southwestern Bell, SHALL DISBURSE REFUNDS TO NON-SETTLING PARTIES within 30 days of the release of this Order. Such carriers, if participating in pending appeals, may keep amounts attributable to nonsettling party refunds in escrow, pending Commission action on requests for stay pending appeal.

27. IT IS FURTHER ORDERED that BellSouth SHALL SUBMIT by January 14, 1991 a revised refund plan with analysis of overearnings based upon the earnings review periods specified in Attachment B to the Commission's *Refund Order*, n.1 *supra*.

28. IT IS FURTHER ORDERED that Southwestern Bell SHALL SUBMIT by January 14, 1991 a revised refund plan with overcharge analysis based upon actual demand for affected services during the periods specified in Attachment B to the Commission's *Refund Order*, n.1 *supra*.

29. IT IS FURTHER ORDERED that Southwestern Bell MAY IMMEDIATELY DIMINISH ESCROWED AMOUNTS for the 1985-86 monitoring period by 90 percent of the amount allocated to settling parties, and, for the 1987-88 monitoring period, by the full amount allocated to settling parties.

30. IT IS FURTHER ORDERED that carriers subject to refund disbursement obligations respecting non-settling parties shall not disburse refunds until five business days after the release of this Order, to provide affected parties opportunity for the filing of stay requests.[14]

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, 5 FCC Rcd 412 (1989) (*Refund Order*).

[2] The history of the strategic pricing investigation is described in the Commission's first reconsideration Order in that phase of the proceeding. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 400 (1989) (*Pricing Order Reconsideration*).

[3] BellSouth submitted its report February 28, 1990.

[4] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 2506 (1990) (Com.Car.Bur.)(*Escrow Order*). The Bureau iterated that while refunds specified by the *Refund Order* might be subsequently adjusted in the refund process, the escrow requirements arising from that Order were not contingent upon adjustments or refinements by the LECs, and were subject to alteration only in two respects explicitly provided by the *Refund Order*: escrowed amounts were to be limited to the lesser of overearnings or overcharges, and were then to be augmented by interest accrued at the current IRS rate.

[5] BellSouth submitted its supplemental report April 5, 1990.

[6] Comments were submitted by Allnet Communication Services, Inc. (Allnet); Competitive Telecommunications Association (CompTel); MCI Telecommunications Corporation (MCI); and Williams Telecommunications Group, Inc. (Williams). Replies were submitted by Allnet; jointly by BellSouth Telephone Companies, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (BellSouth); Cincinnati Bell Telephone Company (CBT); jointly by Ohio Bell Telephone Company (Ohio Bell) and Wisconsin Bell, Inc. (Wisconsin Bell); Pacific Bell (Pacific); Southwestern Bell Telephone Company (SWBT); and jointly by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, doing business as US West Communications (US West).

In addition, Telephone Communications Corp. (TCC), moved on August 30, 1990 to file late comments in this proceeding consisting principally of an informal complaint submitted Aug. 28, 1990. US West moved to strike TCC's motion (Sept. 4, 1990) and TCC opposed US West's motion (Sept. 12, 1990).

[7] Allnet says the LEC settlements create a "dilemma" because non-settling customers such as Allnet must wait for the Commission's action to receive refunds although other customers have already settled with the carriers. Allnet Comments at 1-3. CompTel argues that the settlements should be recorded below-the-line by LECs in the first instance, consonant with Commission practice respecting prejudgment settlement of civil and criminal suits. CompTel Comments at 3. We did not invite further comments in order to review settlement procedures generally. We invited comment in order to determine the effect of settlements that in fact occurred upon refund obligations established in a particular Commission order. These comments do not appear to address the relevant question.

[8] For purposes of Part 65 earnings categories, "subelement" refers to sub-categories of the special access element, *i.e.*, to individual special access services.

[9] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*).

[10] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order (On Reconsideration), 5 FCC Rcd 4861 (1990) (*Refund Order Reconsideration*).

[11] In view of that conclusion we need not determine whether TCC has in fact demonstrated good cause for accepting late-filed comments. This disposition of TCC's refund claim is not a determination of the merits of its separately filed informal complaint.

[12] The consolidated appeals are pending in the Sixth Circuit *sub nom.* Ohio Bell v. FCC, Case Nos. 3146, 90-3688 *et al.*

[13] Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (1958)(*Virginia Petroleum Jobbers*).

[14] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order, 5 FCC Rcd 1306 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal No. 2626

Revisions to Tariff
F.C.C. No. 16

ORDER

Adopted: December 28, 1990; Released: December 31, 1990

By the Deputy Chief, Common Carrier Bureau:

1. By the captioned transmittal AT&T Communications (AT&T) proposes revisions to its tariff for Defense Commercial Telecommunications Network (DCTN), a service that AT&T provides to the United States Department of Defense (DOD). AT&T proposes to replace the existing, satellite-based video teleconferencing service with a terrestrial, fiber-optic based system and revises the rates and charges for this service. AT&T Transmittal 2626, Description and Justification (D&J) at 1-3. Williams Telecommunications Group (WTG) has filed a petition to reject or suspend and investigate the captioned filing and AT&T has filed a reply. In addition, AT&T has filed an application for special permission to allow it to advance the effective date of the captioned tariff revisions.

2. WTG argues that the revised rates for DCTN video teleconferencing are unreasonably discriminatory. WTG contends that the provision of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which allows carriers to create classifications of services, does not give the carrier *carte blanche* to discriminate among classes of customers. WTG Petition at 3-9. WTG also asserts that AT&T has provided insufficient cost data to allow it to analyze AT&T's rates and questions how AT&T will recover the costs of satellite facilities. *Id.* at 9-14. Finally, WTG contends that the captioned transmittal violates the Commission's private line guidelines contained in Section 61.40 of the Commission's Rules, 47 C.F.R. § 61.40, and speculates that AT&T may be bundling customer premises equipment with regulated transmission services. *Id.* at 14-15.

3. In response, AT&T asserts that "a preferential rate to the government cannot be discriminatory." AT&T Reply at 3. AT&T also contends that compliance with the Commission's private line guidelines is not mandatory and that Section 61.40 of the Commission's Rules permits carriers to demonstrate that non-conforming rate structures are nevertheless reasonable. AT&T argues that it has done this by providing cost support information which it asserts is fully sufficient under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. *Id.* at 5-7.

4. The Common Carrier Bureau has reviewed AT&T's Transmittal No. 2626, WTG's petition, and AT&T's reply. We conclude that no compelling argument has been presented that the proposed tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate AT&T Communications Tariff F.C.C. No. 16, Transmittal No. 2626, filed by Williams Telecommunications Group IS DENIED.

6. IT IS FURTHER ORDERED that AT&T MAY FILE to advance the effective date of Transmittal No. 2626. For this purpose, Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, are waived and Special Permission No. 90-1373 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2057

Tariff F.C.C. No. 68

ORDER

Adopted: December 28, 1990; Released: December 31, 1990

By the Deputy Chief, Common Carrier Bureau:

1. On December 18, 1990, Southwestern Bell Telephone Company (Southwestern) filed the above-captioned revisions to its Tariff F.C.C. No. 68 to implement its plan for equal access for 1+ interLATA coin calls made from public telephones. On December 20, 1990, US Sprint Communications Company Limited Partnership (US Sprint) requested that the due date for petitions regarding Southwestern's tariff revisions be extended by one week to allow interested parties more time to prepare their comments. US Sprint contends that, in view of the importance of the instant tariff filing and because of the absence of key personnel due to the holiday season, US Sprint and other interested parties should be granted additional time to prepare their pleadings.

2. The Common Carrier Bureau has reviewed US Sprint's request and we conclude it has demonstrated good cause for the one-week extension it requests. Therefore, petitions regarding Southwestern's Transmittal No. 2057 may be filed by interested parties no later than January 9, 1991. Replies to petitions may be filed no later than January 16, 1991.

3. Accordingly, IT IS ORDERED that the request for extension of time filed by US Sprint Communications Company Limited Partnership with regard to the above-captioned tariff transmittal IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Transmittal No. 341
Telephone Companies
Tariff F.C.C. No. 4

ORDER

Adopted: December 20, 1990; Released: December 27, 1990

By the Chief, Common Carrier Bureau:

1. On October 1, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 341 to revise their "dark," or "dry," fiber individual case basis (ICB) service offerings to terminate August 5, 1991, in compliance with a Commission Order.[1] MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 341, to which BellSouth replied. Transmittal 341 is scheduled to become effective December 30, 1990.

2. MCI contends that BellSouth's filing does not fully comply with the *Reconsideration Order* because Transmittal 341 fails to establish general rates for dark fiber service. MCI Petition at 1. MCI notes that it opposed a petition for limited waiver of the *Reconsideration Order* filed by BellSouth which states that the carrier intends to exit the dark fiber market when its existing dark fiber ICBs terminate, and therefore BellSouth should not be required to file general rates. *Id.* at 1-2. MCI reiterates its opposition to BellSouth's petition for limited waiver, and states that "BellSouth's intention to exit the Dark Fiber market would place it in violation of Sections 201(a) and 214 of the Communications Act." *Id.* at 2. MCI incorporates by reference its opposition to BellSouth's petition for waiver. *Id.* at 3.

3. BellSouth asserts that it filed Transmittal 341 to comply with Commission instructions that existing dry fiber ICBs be terminated. BellSouth Reply at 1 (citing the *Reconsideration Order* and Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 5919 (Com.Car.Bur. 1990)). According to BellSouth, the question of whether BellSouth must file a general dry fiber tariff offering is the subject of other proceedings. *Id.* at 1-2 (citing Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, BellSouth Petition for Waiver, filed Aug. 22, 1990 and EDS Petition for Declaratory Ruling, filed Oct. 3, 1990). On November 1, 1990, BellSouth filed Transmittal No. 354 which proposes the establishment of averaged, general tariff rates for dark fiber.

4. The Common Carrier Bureau has reviewed Transmittal 341, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the tariff revisions filed by BellSouth are patently unlawful so as to require rejection.

5. Accordingly, IT IS ORDERED that the petition to reject BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 341, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842 (1990) (*Reconsideration Order), further recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2601 and 2609

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2601 and 2609 to introduce Virtual Telecommunications Network Service (VTNS) Options 72 and 73, by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Options 72 and 73 are each stabilized for a three-year term. Option 72 may be extended for two additional one-year terms at the same stabilized rates if the customer opts for such extension and AT&T agrees. *See* AT&T Transmittal No. 2601, Description and Justification (D&J) at 1-4; AT&T Transmittal No. 2609, D&J at 1-4. The basic charge for VTNS Option 72 is $997,000 per month, while the basic charge for Option 73 is $64,700 per month. *See* AT&T Transmittal No. 2601, D&J at 5; AT&T Transmittal No. 2609, D&J at 5. Transmittal Nos. 2601 and 2609 are scheduled to become effective December 29, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate, *inter alia*, Transmittal No. 2601 on October 10, 1990, and a similar petition against Transmittal No. 2609 on October 22, 1990. AT&T filed replies on October 19, 1990, and November 1, 1990, respectively.

3. Sprint argues that AT&T has failed to demonstrate that Options 72 and 73 are integrated service packages that are "unlike" AT&T's other component services. Further, Sprint contends that even if they could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and are thus discriminatory. Sprint Option 72 Petition at 1-2; Sprint Option 73 Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 74 individual VTNS offerings makes clear that each such offering is designed for one customer. Sprint Option 73 Petition at 2. Additionally, Sprint maintains that various specifications in the transmittals also effectively restrict each offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to cease its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. Sprint Option 72 Petition at 2-4; Sprint Option 73 Petition at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.2 billion and likely accounts for more than 2 percent of the entire interexchange market. Sprint Option 72 Petition at 4; Sprint Option 73 Petition at 4. Sprint also alleges that AT&T's cost support for Options 72 and 73 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). Sprint Option 72 Petition at 5 & n.5; Sprint Option 73 Petition at 5 & n.5.

4. AT&T contends that the rates in Options 72 and 73 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered by AT&T in separate tariffs. AT&T Option 72 Reply at 4-5; AT&T Option 73 Reply at 3-4. AT&T argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these costing methods satisfy the requirements of Section 61.38 of the Commission's Rules. AT&T Option 72 Reply at 7-9 & 8 n. *****; AT&T Option 73 Reply at 5-7 & 6 n.*****.

5. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2601 and 2609, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2601 and 2609 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

7. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2601 and 2609, filed by US Sprint Communications Company Limited Partnership ARE DENIED.

8. IT IS FURTHER ORDERED that Transmittal Nos. 2601 and 2609 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

9. IT IS FURTHER ORDERED that American Telephone and Telegraph Company is granted permission to advance the effective date of the revisions proposed in Transmittal Nos. 2601 and 2609 to December 22, 1990.

10. IT IS FURTHER ORDERED that for the above purpose, Special Permission No. 90-1314 is assigned, and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Transmittal No. 389
Telephone Companies

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

1. On September 28, 1990, Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 389 to reduce their rates for DS3 service in response to marketplace demands and increased competition. Bell Atlantic Transmittal 389, Description and Justification (D&J) at 1-1. On October 15, 1990, Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, suspend and investigate the tariff revisions. On October 16, 1990, Institutional Communications Company and Eastern Telelogic Corporation (ICC/ETC) filed a petition to reject or suspend and investigate Transmittal 389.[1] Bell Atlantic filed reply comments on October 25, 1990. The tariff is scheduled to take effect on December 27, 1990.

2. Bell Atlantic states that these reductions are being proposed in direct response to customer dissatisfaction with its existing rates. D&J at 1-3. Bell Atlantic claims that its current rates are not competitive and that its analysis of the market shows that if they are maintained, Bell Atlantic's market share will decline from its current 56 percent to 7 percent by 1995. *Id. at*5-2 to 5-5. Bell Atlantic argues that the proposed rates will cover costs, and due to increased demand it will have an increase in net revenue of $5.8 million if the reductions are allowed. *Id.* at 4-3.

3. The petitioners present three major arguments against Transmittal 389. First, they claim that Bell Atlantic has not provided adequate cost support for the rate reductions. MFS Petition at 9; ICC/ETC Petition at 5. Second, the petitioners argue that there is no stated support for the projections that Bell Atlantic will lose significant market share since Bell Atlantic relies on proprietary analyses which have not been made available for review. MFS Petition at 5-6; ICC/ETC Petition at 10-11. Third, the petitioners argue that the proposed rate reductions represent an attempt by Bell Atlantic to "preposition" itself by lowering rates before price caps are implemented. MFS Petition at 4; ICC/ETC Petition at 12. ICC/ETC also notes that under the *LEC Price Cap Order* [2] proposed price decreases greater than 5 percent, such as this, are to receive close scrutiny and must provide an average variable cost showing. ICC/ETC Petition at 6. ICC/ETC contends that Bell Atlantic has not provided such a showing. *Id.* at 8.

4. Bell Atlantic responds that the proposed rate reductions are pro-competitive since it will not be able to compete effectively in the DS3 market without reducing its rates. Bell Atlantic Reply at 3-4. Bell Atlantic claims that it has provided sufficient cost support for the reductions by including a cost of service study for 1990 in the Description and Justification. Bell Atlantic attached a cost study for the preceding 12-month period to its reply comments. *Id.* at 4.

5. Bell Atlantic also presents a series of arguments in defense of its market projections. *Id.* at 7-11. Finally, Bell Atlantic argues that the *LEC Price Cap Order* does not limit price decreases to 5 percent per year. Rather, according to Bell Atlantic, rate reductions beyond 5 percent require more detailed cost support. *Id.* at 13. Bell Atlantic argues that its cost support covers the average variable costs, and is sufficient for a below band filing under price caps. *Id.* at 14.

6. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal No. 389, the MFS and ICC/ETC petitions, and Bell Atlantic's reply. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 389, filed by Metropolitan Fiber Systems, and Institutional Communications Company/Eastern Telelogic Corporation, ARE DENIED.

8. IT IS FURTHER ORDERED that the motion to accept a late-filed petition filed by Institutional Communications Company and Eastern Telelogic Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] ICC/ETC filed a motion requesting that its late-filed petition be accepted. Bell Atlantic does not object to this motion. Bell Atlantic Reply Comments at 1 n.2. We believe that ICC/ETC sufficiently demonstrated cause for its untimely petition. Accordingly, we grant its motion.

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC 90-314, Second Report and Order (released Oct. 4, 1990) (*LEC Price Cap Order), recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 27, 1990

BELLSOUTH FILES PETITION FOR WAIVER OF PARTS 64 AND 69 OF THE COMMISSION'S RULES REGARDING BILLING VALIDATION SERVICES

Pleading Cycle Established

On November 27, 1990, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (collectively, BellSouth) filed a petition for waiver of Parts 64 and 69 of the Commission's Rules to permit BellSouth to continue offering validation of its calling cards as part of the billing and collection services offered to third parties.

BellSouth has developed a database which is to be used to validate calling cards issued by the Bell Operating Companies (BOCs) and provide other billing validation services. The database, known as the Line Information Database (LIDB), contains information regarding calling cards issued by BellSouth as well as billed number screening information.

BellSouth proposes to use its LIDB to validate calling cards issued by the BOCs, to verify third-party billing data, and to screen collect called numbers for intraLATA calls. BellSouth proposes to offer LIDB validation service to other parties who may wish to validate calling cards issued by BellSouth, to verify third-number billing data, and to screen collect called numbers. BellSouth seeks a waiver of the Commission's Part 64 rules in order to account for the costs associated with providing validation services to third parties as a nonregulated activity. BellSouth also requests a waiver of Part 69, to the extent necessary, to establish a separate local transport charge associated with transporting a query to the LIDB.

Interested parties should file comments regarding the BellSouth waiver petition no later than **January 25, 1991.** Reply comments concerning the waiver petition may be filed no later than **February 18, 1991.**

Parties are requested to furnish one copy of each pleading to International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the BellSouth waiver petition, along with other related documents, may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all pleadings and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-629

In the Matter of

Nevada Bell
Tariff F.C.C. No. 1

Transmittal No. 113

ORDER TO SHOW CAUSE

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On September 19, 1990, the Commission adopted the *LEC Price Cap Order* [1] requiring the regional Bell Operating Companies, and the GTE Telephone Operating Companies to implement a "price cap" system of incentive regulation for local exchange carriers (LECs) beginning January 1, 1991. The Common Carrier Bureau issued the *TRP Order*,[2] on October 24, 1990, establishing certain requirements for summary cost support material, and a schedule and procedures, that LECs must follow in filing modifications to their access tariffs to implement the *LEC Price Cap Order* and the Commission's *Represcription Order*. [3]

II. PLEADINGS

2. On November 1, 1990, Nevada Bell filed its tariff revisions in response to the *TRP Order*.[4] Nevada Bell's filing includes an Actual Price Index (API) for the Special Access basket that is above its Price Cap Index (PCI) for that basket.[5] Nevada Bell explains that this anomaly is caused by decreased demand and revenue requirement in the Special Access category. It contends that if it had used 1990-1991 demand to calculate Special Access API, instead of 1989-1990 demand, the API would have been below PCI.[6]

3. On November 16, 1990, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the Nevada Bell filing.[7] MCI complains that the Nevada Bell Special Access API exceeds the PCI, in contravention of the price cap rules. MCI requests that Nevada Bell adjust its rates for Special Access services to ensure that actual rates in the Special Access basket are below or equal to the PCI.[8]

4. In its reply, filed November 29, 1990, Nevada Bell presents two arguments to explain why its Special Access API exceeds its PCI. First, Nevada Bell's forecasted 1990-1991 demand for most Special Access services is significantly lower than the demand for those services experienced in 1989. Second, Nevada Bell recently completed the final phase of its gradual implementation of cost-based non-recurring charges for Special Access services.[9] Thus, Nevada Bell argues it should not be forced to lower its special access rates further to comply with the cap requirements since the rates are already cost based.

III. DISCUSSION

5. The *LEC Price Cap Order* stated that above-cap filings "will be found lawful only in the unlikely event that these rules have the effect of denying a LEC the opportunity to attract capital to continue to operate ...."[10] A LEC that files an above-cap rate must provide extensive cost support information in detail that exceeds the cost support normally required in an annual access tariff filing for LECs subject to rate of return regulation.[11]

6. Nevada Bell does not provide the detailed cost support required by Section 61.49(e) of the Commission's Rules for an above-cap filing.[12] Although it has attempted to provide the showing required in an annual access tariff filing, it has not shown that it will be unable to attract capital and continue to operate.

7. Accordingly, we direct Nevada Bell to file, no later than December 26, 1990, an answer showing cause why the Bureau should not prescribe rates that would not exceed the PCI, or a tariff transmittal reducing the rates to that level. Any such transmittal shall be filed to be effective no later t m January 1, 1991.

IV. PROCEDURAL MATTERS

A. Ex Parte Requirements

8. For purposes of this non-restricted notice and comment investigation, the parties are advised that *ex parte* presentations are permitted except during the "Sunshine Agenda" period.[13] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases a final Order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.[14] During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[15]

9. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[16] Any person who submits a written *ex parte* presentation must provide on the same day it is submitted, a copy of the presentation to the Secretary of the Commission for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written submissions must provide on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments and must also state by docket number the proceeding to which it relates.[17]

B. Filing Requirements

10. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, copies of all pleadings shall be delivered to the Chief, Tariff Division, Common Carrier Bureau, and to the Commission's contractor for public records duplication, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20037, (202) 857-3800. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary of the Commission, 1919 M Street, N.W., Washington, D.C. 20554. Such comments should specify the docket number of the proceeding.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 205(a), 213, 218, and 220 of the Communications Act, 47 U.S.C. §§ 154(i), 205(a), 213, 218, 220, and Sections 0.291 and 1.701 of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.701, that if Nevada Bell elects not to file a revised tariff to reduce its Special Access rates, it is directed TO SHOW CAUSE why it should not be required to reduce Special Access rates in its interstate access tariff in accordance with Section 61.49 of the Commission's Rules.

12. IT IS FURTHER ORDERED that Nevada Bell SHALL MAKE such showing no later than December 26, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order*).

[2] Commission Requirements for Cost Support Material To Be Filed with January 1, 1991 Access Tariff Revisions, DA 90-1499, released Oct. 24, 1990 (Com.Car.Bur.) (*TRP Order*).

[3] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, FCC 90-315, released Dec. 7, 1990 (*Represcription Order*).

[4] Nevada Bell, Tariff F.C.C. No. 1, Transmittal No. 113, filed Nov. 1, 1990.

[5] Nevada Bell has a PCI of 98.38 and an API of 98.92 for the Special Access basket.

[6] Nevada Bell, Transmittal No. 113, Description and Justification at 4.

[7] MCI Petition, In the Matter of January 1, 1991 Access Tariff Revisions, at 8-9. Petitions against Nevada Bell Transmittal 113 were also filed by American Telephone and Telegraph Company and Ad Hoc Telecommunications Users Committee. Those two petitions deal with aspects of the Nevada Bell filing which are not at issue in this Order, and consequently will be addressed in a separate Order.

[8] *Id.*

[9] Nevada Bell Reply Comments, Transmittal No. 113, at 7-9.

[10] *LEC Price Cap Order* at 134 (para. 304).

[11] *Id.* at 135 (para. 304). Specifically, a LEC must provide an explanation of the manner in which costs have been allocated among baskets and, within the affected basket, a cost assignment showing down to the lowest possible level of disaggregation, including a detailed explanation of the basis for the prices of all rate elements to which costs are not assigned. *See* Section 61.49(e) of the Commission's Rules, 47 C.F.R. § 61.49(e).

[12] Section 61.49(e) of the Commision's Rules, 47 C.F.R. § 61.49(e).

[13] *See generally* Section 1.120(a) of the Commission's Rules, 47 C.F.R. § 1.120(a).

[14] *See* Section 1.202(f) of the Commission's Rules, 47 C.F.R. § 1.202(f).

[15] *See* Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

[16] *See* Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b).

[17] *See* Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Certain Reporting
Requirements of Annual Reports
Form O and Form R.

ORDER

Adopted: December 26, 1990; Released: December 28, 1990

By the Deputy Chief, Common Carrier Bureau:

1. Sections 1.785 and 43.21 of the Commission's Rules, 47 C.F.R. §§ 1.785 and 43.21, require wire-telegraph, ocean-cable and radiotelegraph carriers having annual operating revenues in excess of $50,000 to file annual reports with the Commission not later than March 31 of each year, covering the preceding calendar year. The Annual Report Form O is required from wire-telegraph and ocean-cable carriers,[1] and the Annual Report Form R is required from radiotelegraph carriers.[2]

2. As a result of a petition filed by Western Union Corporation, the Bureau completed an analysis of Form O and Form R and issued an Order[3] that only the schedules listed below were needed for the reports covering the 1989 calendar year.

Schedule	Name
1	Identity of Respondent
2	Board of Directors
4	Control over Respondent
5	Security Holders and Voting Rights
6	Elections
7	Organizations Controlled by Respondents
9	Contingent Liabilities of Respondents
100	Comparative Balance Sheet - Asset Side
200	Comparative Balance Sheet - Liability Side
300	Income and Earned Surplus Statement
301	Operating Revenues (301T-C for Wire-Telegraph and Ocean-Cable or 301R for Radiotelegraph)
	330 Operating Expenses (330T-C for Wire-Telegraph and Ocean-Cable or 330R for Radiotelegraph)
414	Changes During the Year Signature Page

3. We concluded that, under the circumstances presented by the parties with respect to 1989, waiver of the reporting requirements contained in the other schedules would significantly reduce reporting burdens without depriving the Commission of essential information. The relief granted to Western Union (requiring only the above schedules) was also granted to the other record carriers.

4. There have been no significant circumstances that warrant a modification of the information required. Therefore, to reduce reporting burdens and eliminate regulations that are unnecessary or inimical to the public interest, we again waive the requirements to file any schedules not listed above for the 1990 and 1991 Form O and Form R. Our granting this limited waiver does not preclude the Commission from directing the affected carriers to file detailed information should the need arise.

5. Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Sections 0.91(a), 0.291 and 1.3 of the Commission's Rules, That the reporting requirements of Annual Reports Form O and Form R as described above, are hereby waived for the 1990 and 1991 reports only.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Carriers that reported on Form O for 1989 were FTC Communications, Inc.; Western Union International, Inc.; and Western Union Corporation.

[2] Carriers that reported on Form R for 1989 were RCA Global Communications, Inc.; TRT Telecommunications Corporation; and U.S. Liberia Radio Corporation.

[3] Waiver of Certain Reporting Requirements of Annual Reports Form O and Form R, 5 FCC Rcd 2563 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1506

Tariff F.C.C. No. 128

ORDER

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

1. Pacific Bell (Pacific) filed Transmittal No. 1506 on October 30, 1990, to reduce and restructure its rates for DS3 and DS3x3 high capacity special access service, and to provide a new high capacity service, DS3x12. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to suspend and investigate Transmittal 1506 on November 15, 1990, to which Pacific replied on November 26, 1990. Williams Telecommunications Group (WTG) filed separate comments on November 27, 1990.[1]

2. MFS contends that Transmittal 1506 proposes extraordinary rate reductions for DS3 service that are not supported by cost data that meet the standards of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. MFS Petition at 2. MFS acknowledges that Pacific provides disaggregated cost data to justify its DS3 and DS3x3 rate reductions but notes that Pacific does not explain why those cost savings result in widely disproportionate reductions in different service rates. *Id.* at 3. MFS further argues that Pacific fails to meet the "average variable cost" standard described in the *LEC Price Cap Order* [2] because it does not show which cost categories have experienced significant cost reductions and fails to describe the distribution of the cost savings among all categories of service provided over new facilities. *Id.*

3. In its reply, Pacific charges that MFS does not identify any particular price, rate, or costs contained in the transmittal which fail to meet Commission standards, and explains that all services in its transmittal are priced above cost. Pacific Reply at 1-2. Pacific argues that it performed detailed cost studies, examined the cross-elasticities in demand, and then quantified the revenue impact of the introduction of the new options. Pacific states that its filing is revenue neutral since the rates for the DS3 family of products were matched to the previously approved revenue requirement. *Id.* at 2. Pacific states that MFS's allegation that reduced costs should have a more "proportional effect on the rates for all services provided for such facilities" is incorrect because a reduction in fiber optic facilities affects DS3 services but not other unrelated services. *Id.* at 2-3.

4. Pacific further argues that its transmittal should be examined under existing rate of return requirements for cost support. But even under the price cap rules, Pacific notes, the data submitted with its filing show that "the average fully allocated costs provided are greater than average variable costs." *Id.* at 3-4.

5. The Common Carrier Bureau has reviewed Pacific's Transmittal 1506 and the associated pleadings. We conclude that Pacific's tariff revision presents no question that warrants suspension or investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1506, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The WTG pleading, which opposes the MFS petition, is not contemplated by the Commission's rules and is therefore dismissed. *See* Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order), recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

NATIONWIDE COMMUNICATIONS, INC. (KITN) CSR-3383

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 8, 1991

By the Commission:

1. On April 16, 1990, Nationwide Communications, Inc. (hereinafter "KITN"), licensee of Television Broadcast Station KITN (Ind., Channel 29), Minneapolis - St. Paul, Minnesota, filed a petition for special relief seeking a ruling that KITN is significantly viewed in Nicollet, Rice, and Watonwan Counties, Minnesota on the basis of county-wide, in lieu of the ordinarily required community-specific, audience survey data. A partial opposition to this petition was filed on May 12, 1990, by United Communications Corporation (hereinafter "KEYC-TV"), licensee of Station KEYC-TV (CBS, Channel 12), Mankato, Minnesota, and KITN has replied.

2. In 1972, the Commission adopted a comprehensive regulatory scheme for cable television. *Cable Television Report and Order*, 36 FCC 2d 143, *recon.*, 36 FCC 2d 326 (1972). As part of this regulatory scheme, the Commission limited the number of distant signals a cable system could import from outside of its market. Exemptions to these limits, however, were made for both significantly viewed signals and for specialty stations. A signal is considered to be significantly viewed if it meets certain designated minimum viewership levels off-the-air. A station was considered to be a specialty station if it programmed a designated minimum amount of foreign language, religious, or automated programming.[1] When the Commission deleted its distant signal carriage limitations in 1982, the Commission also deleted its rule defining a specialty station. This category of stations was no longer needed because there were no longer any rules limiting signal carriage from which exemptions on this basis were needed. *Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The Commission continues to utilize the significantly viewed status of signals for various purposes, such as exemption from the Commission's program exclusivity rules. 47 C.F.R. §§76.92(f), 76.156(a). On the other hand, the Copyright Office has continued to recognize specialty status for purposes of determining royalty payment rates, the carriage of specialty stations by cable systems incurring lesser fees than the carriage of other distant stations. Similar treatment is afforded significantly viewed signals by the Copyright Office.

3. In establishing the category of significantly viewed stations, the Commission published a nationwide list, county-by-county, of those stations initially deemed to be significantly viewed. *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d at 378-463 app. B. Stations not included in this list may be added in one of two ways. A station may demonstrate that it meets the requisite viewership levels utilizing current community-specific data. 47 C.F.R. §76.54(b). Alternatively, a "new" station -- one not included in the surveys, which established the 1972 list -- may utilize county-wide data, provided that such data is from the station's first three years of operations. 47 C.F.R. §76.54(d). For purposes of this rule, the Commission has extended "new" station status to stations shifting from subscription or noncommercial status to commercial status after the initial survey period.

4. KITN began operation on October 6, 1982 (as Station WFBT-TV) broadcasting a religious programming format. Some time thereafter, however, by May 1984, religious programming ceased to take up the majority of the station's broadcast time.[2] Pursuant to former §76.5(kk) of the Commission's Rules, KITN contends that it could have been classified as a specialty station at its inception. In view of this, states KITN, the station's change from a specialty to a non-specialty format in 1984 entitles KITN to be considered a "new" station for purposes of determining its status as significantly viewed pursuant to §76.54 of the Rules. Consideration as a "new" station, KITN notes, would allow it to demonstrate its status as significantly viewed utilizing county-wide data from the period 1984-1987, rather than current community-specific data. KITN contends that switching its format from specialized to non-specialized programming is equivalent to a station changing from subscription (STV) or non-commercial to a commercial format, or significantly upgrading its technical facilities. In each situation, KITN maintains, a station of limited audience appeal has made changes in its operation enabling it to attract a more widespread audience. Indeed, argues KITN, the Commission recognized the limited audience appeal of specialty stations in establishing this category, citing the *First Report and Order in Docket No. 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

5. In support of its request to be declared significantly viewed in Nicollet, Rice, and Watonwan Counties, Minnesota, KITN submits 1986 Arbitron viewing data for those counties, and contrasts this data with 1984 Arbitron data. According to the Arbitron data, taken from Arbitron's *1986 County Coverage Survey, Cable-Controlled*, conducted during four separate, consecutive four-week periods in May, July, and November 1985, and February 1986, KITN achieved a 4% share of total viewing hours and a net weekly circulation of 15% in Nicollet County; a 2% share of total viewing hours and a net weekly circulation of 21% in Rice County; and a 6% share of total viewing hours and a net weekly circulation of 32% in Watonwan County. Accordingly, states KITN, in each case it has met the necessary viewership levels to be declared to be significantly viewed as an independent station: a 2% share of total viewing hours and a net weekly circulation of 5%. 47 C.F.R. §76.5(i). In contrast, notes KITN, as a specialty station, it posted no ratings in non-cable homes in Nicollet County in Arbitron's *1984 County Coverage Survey, Cable-Controlled*. [3] The measured improvement cannot be attributed to a facilities upgrade, notes KITN, for none has occurred. It is in the public interest, KITN

claims, to enable it to utilize county-wide data as a "new" station to achieve significantly viewed status, for just as STV and non-commercial stations which have become commercial stations have increased significantly their viewership potential (as have stations which have significantly upgraded their technical facilities), a station which has switched from a specialty to a non-specialty format will by its very nature attract many more viewers.

6. KEYC-TV, in partial opposition to KITN, argues that with respect to Nicollet and Watonwan Counties (KEYC-TV does not object to KITN's petition insofar as it seeks significantly viewed status in Rice County), KITN's viewership apparently results not from off-air viewing of KITN's own signal, but rather from viewing of rebroadcasts of the station's signal by a translator north of St. James, Minnesota.[4] KITN cannot base a claim for significantly viewed status on translator data, contends KEYC-TV, citing *KOIN-TV, Inc.*, 93 FCC 2d 186 (1983), and *Scranton Broadcasters, Inc.*, 88 FCC 2d 1482 (1982). Nor, argues KEYC-TV, should KITN be treated as a "new" station. A change in program format is simply not as significant a change as is a change from STV or non-commercial to commercial status, KEYC-TV contends. The notion of viewer ratings in the ordinary sense is inapplicable to STV and non-commercial stations, whereas commercial stations regardless of format depend upon viewership and ratings. A change from one format to the other, therefore, should not be treated as creating a "new" station.[5]

7. In reply to KEYC-TV, KITN notes that KEYC-TV has provided no evidence to prove its allegation that KITN relies upon a translator to rebroadcast its signal to Nicollet and Watonwan Counties. In addition, claims KITN, the determinative factor in deciding whether to treat a station as "new" for purposes of §76.54 of the Rules "is whether the station in question has changed its operations so dramatically so as to increase significantly its viewership potential." This, claims KITN, it has done, in changes from a specialty to a general interest format.

8. KITN misapprehends the underlying rationale of what constitutes a "new" station for purposes of §76.54 of the Rules. In those cases in which we have permitted stations already on the air to be treated as "new" for such purposes, the station in question has done more than merely seek to offer programming thought to be more attractive to its existing potential audience base. Rather, the station has undergone very extensive technical improvements so as to increase significantly its coverage potential, *e.g., Independent Broadcasting Company (KOLR-TV)*, 54 RR 2d 712 (1983); *Calvert Telecommunications Corporation d/b/a CALTEC*, 63 FCC 2d 1022 (1977), or alternatively, the station has switched from an STV or non-commercial mode of operations to a commercial mode of operations, *e.g., HR Broadcasting Corp. of Milwaukee, Inc. (WCGV-TV)*, Cable Television Actions Report No. 3212 (released April 10, 1989) (STV); *Golden West Broadcasters of Oklahoma, Inc. (KAUT)*, Cable Television Actions Report No. 3110 (released September 8, 1987) (STV); *Blair Broadcasting of Oklahoma, Inc. (KOKH-TV)*, Cable Television Action Report No. 2800 (released October 14, 1983) (non-commercial), changes which altered the basic terms of providing its broadcast service. Noncommercial stations were simply not included in the original 1972 significant viewing list regardless of their share of circulation. Thus, they are inherently "new," insofar as the list and significant viewing process are concerned, when they change to commercial status. In the present case, KITN has merely decided to offer different programming to its existing potential audience base. Determining when changes in entertainment format are substantial enough to warrant categorization as a "new" station would reinvolve the Commission in subjective judgements, from which it has previously sought to extricate itself. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Moreover, we have previously established that a change in network affiliation and in non-network program offerings was insufficient to warrant an existing station's loss of significantly viewed status. *Boston Broadcasters, Inc.*, 42 FCC 2d 669 (1973). We see no reason today why a similar change in program content should warrant treatment as a "new" station for purposes of establishing significantly viewed status.

9. Although we have determined that KITN's change of program content does not entitle it to be treated as a "new" station for purposes of demonstrating significantly viewed status, KITN may still demonstrate this status in accordance with §76.54 of the Rules. To do so, KITN must either submit current community-specific data (pursuant to §76.54(b) of the Rules) or county-wide data from prior to October 6, 1985 (pursuant to §76.54(d) of the Rules). This KITN has not done. Accordingly, we cannot find KITN to be significantly viewed in Nicollet, Rice, or Watonwan Counties, Minnesota.

10. In view of the foregoing, we find that grant of KITN's petition is not in the public interest.

11. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3383) filed April 16, 1990, by Nationwide Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Former §76.5(kk) of the Rules defined a specialty station as: "A commercial television broadcast station that generally carries foreign language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours."

[2] KITN states that for the period March 25-31, 1984, "66.5 of the station's 124.25 total program hours (53.5%) were devoted to religious programs. During that same period, 21.5 of the station's 35 total prime time program hours (61.4%) were devoted to religious programs." In contrast, during the period May 6-12, 1984, "only 30.5 of the station's 137 total program hours (22.2%). . . [and] 3 of the station's 35 total prime time program hours (8.5%) were devoted to religious programs." KITN submits its program logs for these periods.

[3] Arbitron published no cable-controlled data for Rice and Watonwan Counties in 1984.

[4] KEYC-TV states that KITN's transmitter is at least 56 miles northeast of Nicollet County (70 miles from the county's center) and at least 88 miles northeast of Watonwan County (103 miles from the county's center), while KITN's Grade B contour falls

far short of the nearest portions of Nicollet and Watonwam Counties by, respectively, some 8 and 40 miles. KEYC-TV, however, identifies no specific translator rebroadcasting KITN.

[5] KEYC-TV also asserts that KITN's request with respect to Nicollet County is repetitive, citing *Nationwide Communications*, Inc. (KITN), Cable Television Actions Report No. 3212 (released April 10, 1989). KITN notes that in that case, it had requested a waiver of the three-year period from the station's inception for data collection, which was denied, a point not at issue in the present controversy.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-582

In re Applications of

AJP Communications Investment Co., Inc. (hereafter "AJP")	File No. BPH-890411MB
SPH Associates (hereafter "SPH")	File No. BPH-890412MA
Country Investments Limited Partnership (hereafter "Country")	File No. BPH-890412MG

For Construction Permit
for a New FM Station
on Channel 288C1 (105.5 MHz)
in Idaho Falls, Idaho

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicant below has petitioned for leave to amend its application on the date show. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
AJP	October 30, 1989 (Engineering)

3. Since no determination has been received from the Federal Aviation Administration as to whether the antennae proposed by SPH, AJP and Country would constitute hazards to air navigation, and since the FAA has determined that SPH's proposal *would* constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

4. *AJP*. An engineering study based upon OST Bulletin No. 65, October 1985, entitled "Evaluating *Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation*," reveals that further information is required to substantiate AJP's showing of compliance with OST Bulletin No. 65. The radiofrequency radiation statement submitted with the application indicated that the applicant will use an antenna that will result in "best case" performance with respect to downward radiation. However, in order for the Commission staff to verify that statement, AJP must submit additional information. The showing must include the total contribution of radiation from all radiofrequency sources on and in the immediate vicinty of the proposed tower and must also include a description of all steps taken to comply with the above mentioned OST Bulletin. Further, AJP must specify height and distance from the tower base of any fence that must be erected. Accordingly, AJP will be required to file, within 30 days of the release of this Order the information detailed in this paragraph with the Presiding Administrative Law Judge. In addition, a copy shall be filed with Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. The comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by AJP, by SPH, and by Country would constitute hazards to air navigation.

2. If a final environmental impact statement is issued with respect to AJP in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. § § 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by AJP IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 4 above, AJP shall submit the requested environmental information to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-590

In re Applications of

NORTH SHORE COMMUNICATIONS, INC. (hereafter: NSC)	File No. BPH-890123MF
NORTH SHORE BROADCASTING LIMITED PARTNERSHIP (hereafter: NSB)	File No. BPH-890123MG
NORTH LAKE RADIO, INC. (hereafter: Lake)	File No. BPH-890123MH
LACOMBE BROADCASTING SERVICE (hereafter: Service)	File No. BPH-890123MN
WILLIAM SEILER (hereafter: Seiler)	File No. BPH-890123MW
LACOMBE COMMUNITY BROADCASTERS, INC. (hereafter: LCB)	File No. BPH-890123MX

For Construction Permit
for a New FM Station on Channel 234A
in Lacombe, LA

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *NSC*. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. NSC has not completed Item 4 correctly. NSC's application gives a post office box number as the residence address for Sheila Wheat Green. Accordingly, NSC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. *Lake*. Hugh E. Dillard, Jr. is an account executive at stations WYLD(AM) and WYLD-FM, New Orleans, Louisiana. It is not immediately apparent if this position is managerial. Therefore, in an abundance of caution, we note that Mr. Dillard's continued employment at WYLD-FM could represent a potential violation of the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Dillard has indicated his intent to terminate his relationship with WYLD in the event of grant of the referenced application. Accordingly, in the event of grant of Lake's application, Dillard will be required to sever all connections with WYLD prior to the commencement of program test authority.

4. *Other Matters*. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after July 17, 1989, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
NSC	February 27, 1990
NSB	March 5, 1990

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Seiler would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Seiler would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That NSC shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That, in the event of grant of Lake's application, Hugh E. Dillard, Jr. will be ordered to divest himself of all interests in and sever all connections with Stations WYLD AM/FM, New Orleans, Louisiana, prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by NSC and NSB ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-583

In re Applications of

KELLY VAUGHAN BUSCH (hereafter "Busch")	File No. BPH-880822MA
VIRGINIA JO & JACK MCFADDEN, SR. (hereafter "McFadden")	File No. BPH-880824MB
WMRI, INC. (hereafter "WMRI")	File No. BPH-880825MT
WEST LAFAYETTE COMMUNICATIONS, INC. (hereafter "West Lafayette")	File No. BPH-880825NH
HICKS BROADCASTING CORPORATION (hereafter "Hicks")	File No. BPH-880825NU
GOODRICH THEATERS, INC. (hereafter "Goodrich")	File No. BPH-880824NB (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 294A
(106.7 MHz) in West Lafayette, Indiana

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Perliminary matters*. Goodrich's application was originally returned on November 28, 1988, because it was apparently filed after the close of the pertinent filing window. *See* letter from the Chief, FM Branch, Reference 8920-DT. Goodrich filed a petition for reconsideration on December 20, 1988; the Commission granted the reconsideration on March 8, 1990, because Goodrich had shown that the application actually was received at the agency on August 24, 1988, one day *before* the filing window closed. However, in reviewing Goodrich's application, the staff discovered that each copy of the application is missing page 6 of FCC Form 301, which contains the financial certification and program service statement. While Goodrich's application contains an exhibit regarding proposed programming, it contains nothing at all with respect to the applicant's financial qualifications. Under Appendix D to the *Report and Order* in MM Docket 84-750, 590 Fed Reg. 19,936, 19,945 (May 13, 1985), a financial certification is one element of tenderability or substantial completeness. Therefore, failure to contain such certification necessitates that Goodrich's application be returned as inadvertently accepted for tender.

3. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after April 13, 1990[1] the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
WMRI	June 27, 1990

4. *Hicks*. Hicks has answered "no" to Section V-B, Item 11, regarding city coverage. However, in the application itself, the contour map clearly shows that 3.16 mV/m contour signal cover the city of license. As a result, no issue will be specified here but the applicant will be ordered to amend its application to correct its response to that question.

5. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Bush, WMRI, West Lafayette, and Hicks would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

6. In the engineering section of the its application, West Lafayette indicates that the height of the radiation center of the transmitting antenna above mean sea level to be 305 meters. However, antenna data on file with the Federal Communications Commission's Antenna Survey Bureau or the Federal Aviation Administration indicates the antenna height to be 301.8 meters above mean sea level. Therefore, West Lafayette will be required to file an amendment with the administrative law judge addressing this discrepancy.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the the tower height and location proposed by Bush, WMRI, West Lafayette and Hicks would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the application for Goodrich IS HEREBY DISMISSED, as inadvertently accepted for tender.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by WMRI IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That Hicks submit an amendment as described in paragraph 4 above with the presiding Administrative Law Judge within 30 days of the date of the release of this Order.

13. IT IS FURTHER ORDERED, That West Lafayette file an amendment as described in paragraph 6 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Goodrich's application was reinstated when the Commission granted its petition for reconsideration on March 8, 1990. As a result, all applicants were provided an opportunity to amend their respective applications as of right until April 13, 1990. *See Memorandum Opinion and Order* in MM Docket No. 84-750, FCC 85-555, 50 Fed Reg. 43,157 (1985). While we are dismissing the Goodrich application, as having been inadvertently accepted for tenderability, the April 13, 1990 date will stand.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-589

In re Applications of

TERESA B. LOWRY (hereafter "Lowry")	File No. BPH-891214MJ
G. DEAN PEARCE (hereafter "Pearce")	File No. BPH-891215MO
MEDIA ENTERPRISES OF WARRIOR, INC. (hereafter "Media")	
(Rick L. Jones, James Michael Anderson and Annie Grace Morgan d/b/a) WARRIOR COMMUNICATIONS (hereafter "Warrior")	File No. BPH-891218MG File No. BPH-891218MH
ROSS BROADCASTING COMPANY, INC. (hereafter "Ross")	File No. BPH-891218MI
HENRY S. GRANGER, JR. (hereafter "Granger")	File No. BPH-891218MJ (RETURNED HEREIN)

For Construction Permit
for a New FM Station on Channel 254A
in Warrior, Alabama

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* A preliminary examination of these applications revealed that the entire allocation for Channel 254A at Warrior, Alabama is short-spaced to the Commission's pending MM Docket No. 90-476 proceeding. Nonetheless, the applicants for the Warrior allotment will be allowed to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket 90-476.

3. *Cross-Interest.* Timothy McReynolds, President and 100% equity owner of Media, is employed as an account executive with WENN(FM) in Birmingham, Alabama. Rick L. Jones and James M. Anderson, general partners in Warrior, are account executives with WZBQ(FM) in Jasper, Alabama. Since it is not immediately apparent whether these positions are managerial, each represents a potential violation of the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Each party has indicated his intent to sever connections with the concerned stations. Accordingly, in the event of grant of Media's or Warrior's application, Mr. McReynolds (Media) or Messrs. Jones and Anderson (Warrior) will be required to sever their connections with the stations noted herein.

4. *EEO.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Ross has filed such statement, it is deficient. Ross has not listed any recruitment sources for women. Accordingly, Ross will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Granger.* Broadcast applications filed on Form 301 on or after June 26, 1989 will now be returned if the requisite financial certification is not made. Specifically, if an applicant fails to certify in the application that it is financially qualified (i.e. if it does not respond to the question or checks "No"), its application will be returned as unacceptable or non-tenderable pursuant to 47 C.F.R. § 73.3564. *See, Report and Order*, 4 FCC Rcd 3853, 3859 (1989). In response to Section III, FCC Form 301 ("Financial Qualifications"), Granger certified "No." Accordingly, Granger's application will be returned as inadvertently accepted for tender.

6. *Air Hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Media would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. *Late-filed Amendment.* Pearce has petitioned for leave to amend its application on July 18, 1990. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Media would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket No.90-476.

12. IT IS FURTHER ORDERED, That in the event of the grant of Media's or Warrior's application, Mr. McReynolds (Media) or Messrs. Jones and Anderson (Warrior) will be ordered to divest themselves of all interests in and sever all connections with Stations WENN(FM) and WZBQ(FM), respectively, prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Ross shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That, the Granger application IS RETURNED as INADVERTENTLY ACCEPTED FOR TENDER.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Pearce IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-557

In re Applications of

HARBOR ISLANDS BROADCASTING, INC. (hereafter "Harbor")	File No. BPH-880519MA
PRAISE BROADCASTING NETWORK, INC. (hereafter "Praise")	File No. BPH-880519ME
WRIGHTSVILLE BEACH RADIO LIMITED PARTNERSHIP (hereafter "WB")	File No. BPH-880519MI
GEORGE S. FLINN, JR. (hereafter "Flinn")	File No. BPH-880519NT
DAVID MCGOWAN AND E. L. FINCH d/b/a OLEANDER RADIO PARTNERS (hereafter "Oleander")	File No. BPH-880519OJ

For Construction Permit
for a New FM Station on
Channel 229A (93.7 MHz)
in Wrightsville Beach, North Carolina

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Harbor*. Information before the Commission indicates that Harbor was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Harbor's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Harbor in this proceeding.

3. *WB*. WB's proposal is short-spaced to the allocation for Leland, North Carolina. When WB filed it's application, it met all of the spacing criteria of 47 C.F.R. Section 73.207(a) and was accepted for filing. However, in a *Report and Order*, in MM Docket No. 88-78, released December 28, 1988, 3 FCC Rcd 7317 (1988), the Commission adopted a *Notice of Proposed Rule Making*, 3 FCC Rcd 1079 (1988) proposing the allocation of Channel 231A to Leland, North Carolina. Accordingly, WB will be required to amend its proposal to show a site which complies with Section 73.207(a) within 30 days of the release of this Order.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and WB have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by WB would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. The sites proposed by the applicants listed below have been issued determinations of hazard by the FCC. Accordingly, an appropriate issue will be specified.

APPLICANTS
Harbor
Oleander

6. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Harbor	August 9, 1989; August 22, 1989 July 16, 1990
WB	April 4, 1990
Flinn	October 5, 1988; February 3, 1989; March 1, 1989; August 28, 1989; February 12, 1990; March 30, 1990; June 13, 1990; August 8, 1990

7. Praise petitioned for leave to amend its application after the last day for filing amendments as of right. The September 4, 1990 amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Harbor.

2. To determine whether Harbor's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Harbor possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation:

APPLICANTS

Harbor

WB

Oleander

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That WB shall submit an amendment as required by paragraph 3, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Harbor, WB, and Flinn ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

AMERICAN CELLULAR SERVICES U.S. File No. 10763-CL-P-645-A-89

For construction authority to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve Market No. 645, Tennessee 3 - Macon Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1991; Released: January 9, 1991

By the Chief, Common Carrier Bureau:

1. Vivian E. Warner (Warner) requests that the Commission reconsider its decision to grant the nonwireline application filed by American Cellular Services U.S. (American), arguing that American failed to correctly identify all of the parties of interest in its application. Upon review, the Common Carrier Bureau finds that Warner's request for reconsideration should be denied because American complied with the Commission's application requirements.

I. BACKRGOUND

2. American was announced as the tentative selectee for the Tennessee 3 (Macon) RSA on December 12, 1989.[1] Interested parties were given until January 29, 1990 to submit petitions to deny. On February 1, 1990, Warner filed a Petition to Deny or Designate for Hearing (Petition). In that Petition, Warner alleged that Wladimir Naleszkiewicz is the real party in interest in American's application, though he was not named as a partner of American in its application. Warner asserted that Naleszkiewicz, controlling shareholder of Genesis Enterprises, Ltd., which prepared American's application for filing, allocated ownership interests to American's partners which were not always consistent with each partner's financial contribution. Additionally, Warner offered in support of her allegation a letter from Naleszkiewicz to American stating that Naleszkiewicz's company would handle the necessary FAA clearance.

3. On February 20, 1990, Warner filed a Supplement to Petition to Deny or Designate for Hearing (Supplement). In her supplement, Warner argued, *inter alia*, that American failed to disclose the partners of Applied Business Research (ABR), itself a 3% partner of American. Warner also advanced in her Supplement that Naleszkiewicz pleaded guilty to two felony charges of committing fraud against clients other than American.

4. On April 11, 1990, Warner filed a collection of documents with the Commission. Among these were pages which appear to have originated with Federal Express and indicate that Warner delivered something at the Federal Express office in Crossville, Tennessee on January 25, 1990 which arrived at the Commission on January 26, 1990. Warner offered no explanation regarding the identity or purpose of these documents.

5. The Mobile Services Division, in its *Memorandum Opinion and Order*, 5 FCC Rcd 3236 (1990), (*Order*) found Warner's Petition and Supplement procedurally defective and substantively without merit. Procedurally, the Petition and Supplement were late-filed and contained no discussion explaining the lateness. Additionally, Warner did not comply with the affidavit requirements of Section 309(d)(1) of the Communications Act or Section 22.30(a)(3) of the Commission's rules. Substantively, the Division found that Warner had offered no support for her allegation that Naleszkiewicz is the real party in interest of American's application. The Division further found that American's failure to disclose the ownership of a general partnership--which is itself a 3% partner in American--was an inconsequential omission. American amended its application in its February 28, 1990, Reply to Warner's original Petition, to correct the clerical error of having omitted ABR's partners and to clarify that neither of the identified individuals is an alien or holds an interest in another cellular application for this market. Accordingly, the Division denied Warner's Petition and granted American's application.

II. CONTENTIONS

6. On June 25, 1990, Warner filed a Petition for Reconsideration of the *Order* which denied its earlier Petition and granted American's application for the non-wireline cellular authorization for the Tennessee 3 RSA. In her Petition for Reconsideration, Warner, while not disputing that her original Petition and Supplement were procedurally defective, argues that the Division was incorrect in determining that American's failure to list the partners of ABR was inconsequential. Warner urges that Sections 22.923(a)(9) and 22.13(a)(1) of the Commission's rules require an applicant to disclose all of the real parties in interest in a Part 22 application. Warner asserts that the Division has trivialized the significance of these sections by characterizing American's failure to disclose all parties as a clerical error. Warner alleges that the Division has previously found certain clerical errors similar to American's omission to render the application fatally defective. In this regard, Warner cites a number of examples where the Commission dismissed cellular applicants for submitting defective site maps.[2] Furthermore, Warner claims the Commission erred by allowing American to amend a defective application after the filing date. Warner argues that such a precedent could lead to an applicant not listing any of its partners in its original application and not naming them until a petition to deny is filed against it. Warner additionally advances the new argument in her Petition for Reconsideration that American has lacked candor in this proceeding. Warner alleges that American was aware of its reporting omission and chose not to file a corrective amendment, hoping that the

error would go unnoticed. Finally, in a footnote, Warner requests the Division to reconsider its conclusion that Naleszkiewicz is not the real party in interest in American's application. Warner, as in her earlier Petition, argues that Naleszkiewicz's role in the assignment of partnership interests proves his control of American. In support of her argument, Warner asserts that because Genesis Enterprises, Ltd., a company owned by Naleskiewicz, and American share the same legal counsel, Naleskiewicz is the real party in interest.

7. American, in its Opposition to Petition for Reconsideration, argues that the Division was correct in finding Warner's original Petition and Supplement procedurally defective and substantively deficient. American asserts that even if Warner had delivered her Petition to Deny to the Federal Express in a timely manner, the Secretary's date stamp is conclusive with respect to determining the timeliness of a filing.

8. American further argues that the Division did not err in finding the omission of the names of the partners of ABR to be a clerical oversight and decisionally insignificant. There are only two partners of ABR, American states, one of whom signed American's partnership agreement and thereby informed the Commission of his identity. Accordingly, the omission only deprived the Commission of the name of one individual, who indirectly owns only 1.5% of American. American asserts that the Commission has concluded in other cases that omission of partnership information from a cellular application does not necessarily constitute a qualification defect and may be corrected by subsequent submission.

9. Warner argues in her Reply to Opposition to Petition for Reconsideration that the Federal Express documents prove her application was timely filed. Additionally, she restates that an applicant must name all the partners of interest to an application. Warner asserts that the Commission only allows an applicant to amend a deficient list of partners in one part of an application if the complete list can be located elsewhere in the application, although she offers no support for this assertion.

III. DISCUSSION

10. With regard to Warner's argument concerning the timeliness of her Petition to Deny, we find that the Division was correct in ruling that Warner's Petition was untimely filed. In *Richardson Independent School District*, 5 FCC Rcd 3135, 3136 (1990), the Commission explained to a petitioner who claimed that the Motion for Extension of Time he submitted was actually filed a day earlier than the stamped date indicated that "[t]he Secretary's date stamp is authoritative and conclusive." Warner's Petition to Deny was date stamped February 1, 1990 and was thus three days late.

11. The argument that American failed to disclose all the parties in interest was initially raised by Warner in her Supplement which was filed on February 20, 1990, three weeks after the final date for filing petitions. Warner did not then, nor does she now, offer any explanation as to why that argument could not have been raised in a timely manner. Accordingly, we cannot find that the Division erred in its disposition that the Supplement was late filed and therefore procedurally defective under Section 1.106 of the Commission's rules.

12. We also uphold the Division's finding that American's omission of indirect ownership interests was inconsequential. American complied with the language of Section 22.13 which requires disclosure of all parties holding an interest in the application. American named its direct partners, *viz*; ABR and twenty-two individuals. Both of ABR's partners, in turn, are U.S. citizens and neither has an interest in another cellular application in the Tennessee 3 market. Warner's argument that allowing American to amend its application could lead to the conclusion that applicants generally may conceal partners is unsupported. Indeed, Section 22.13 of the Commission's rules requires disclosure of "the real party or parties in interest." While American should have included small, indirect ownership interests, its initial omission of this information does not warrant dismissing the application as defective.

13. The cases cited by Warner in support of her argument that American cannot amend the ownership information of its application involve applications with defective site maps. [3] Correct site maps are necessary for the Commission to conduct an engineering review of the application. Although the Commission does need correct ownership information in order to find the applicant legally qualified, the Commission's policy with regard to engineering sufficiency to prevent harmful interference, among other things, is less amenable to flexibility. Omission of an indirect ownership interest does not warrant the same concern during initial application processing. Warner's argument is therefore rejected.

14. Next, we find no basis to reconsider the Division's decision regarding Naleszkiewicz as the real party in interest in American's application. Warner proffers no support for her claim other than vague circumstantial allegations regarding Naleszkiewicz's assignment of partnership interests and the fact that Genesis and American have the same counsel. Likewise, Warner filed no affidavits to support this allegation, thus failing to comply with the requirements of Section 309(d)(1) of the Communications Act and Section 22.30(a)(3) of the Commission's rules. We cannot find that the Division was incorrect in determining that Warner had not supported her allegations that Naleszkiewicz was a real party in interest in American's application.

15. Finally, Warner's assertion that American has lacked candor in this proceeding is rejected. Warner has not raised this allegation prior to her Petition for Reconsideration. Section 1.106(c) only allows new arguments to be raised in a petition for reconsideration when facts or circumstances have changed since the last opportunity to present such matters; or when facts have arisen which were unknown to the petitioner until after his or her last opportunity to raise such matters. Warner makes no assertion that her newly raised allegation falls within the guidelines of Section 1.106(c). Moreover, Warner has not offered any support for her assertion that American was aware of its reporting omission and chose not to file a corrective amendment. Therefore, Warner's candor allegation is rejected.

IV. CONCLUSION AND OREDERING CLAUSE

16. Warner has failed to demonstrate any legal or factual basis on which the Bureau should reverse the Division's action in denying her Petition and granting an authorization to American. Warner's Petition and Supple-

ment were procedurally defective and substantively without merit. For these reasons, we conclude that American Cellular Services U.S. is legally, financially, technically and otherwise qualified to hold the cellular license for the Tennessee 3 (Macon) RSA.

17. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Vivian E. Warner IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Report No. CL-90-61 (released December 12, 1989), *corrected*, Report No. CL-90-61-A (released December 13, 1989).

[2] *See* note 3, *infra*.

[3] In *Rem Communication*, 3 FCC Rcd 3705 (1988), the Commission dismissed an application because the applicant submitted an illegible map and the critical engineering data could not be derived elsewhere in the application. In *Winnebago Cooperative Telephone Association*, 5 FCC Rcd 1247 (Com. Car. Bur. 1990), the Commission dismissed the application of a tentative selectee because the map submitted was not the correct size or scale and the necessary information could not be identified. In *Return of Round IV Cellular Applications*, 103 F.C.C.2d 366 (1986), the Commission dismissed an application because the map was too small for engineering calculations to be performed. In *Western California Cellular Partners*, 5 FCC Rcd 2932 (Com. Car. Bur. 1990), the Commission dismissed an application because the map did not indicate the location of the CGSA and 39 dBu contours, preventing processing of the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

KXTX, INC. CSR-3408

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 9, 1991

By the Commission:

1. On May 10, 1990, KXTX, Inc. (hereinafter "KXTX-TV"), licensee of Station KXTX-TV (Ind., Channel 39), Dallas, Texas, filed a petition for special relief seeking a ruling that KXTX-TV is significantly viewed in Fannin, Grayson, Hunt, Henderson, McLennan, Navarro, and Parker Counties, Texas, based on county-wide audience survey data, as opposed to the normally required community-specific data.[1] KXTX-TV's petition is opposed by Fox Broadcasting Stations Inc. (hereinafter "KDAF"), licensee of Television Broadcast Station KDAF (Fox, Channel 33), Dallas, Texas, and KXTX-TV has replied.

2. In 1972, the Commission adopted a comprehensive regulatory scheme for cable television. *Cable Television Report and Order*, 36 FCC 2d 143, *recon.*, 36 FCC 2d 326 (1972). As part of this regulatory scheme, the Commission limited the number of distant signals a cable system could import from outside of its market. Exemptions to these limits, however, were made for both significantly viewed signals and for specialty stations. A signal is considered to be significantly viewed if it meets certain designated minimum viewership levels off-the-air. A station was considered to be a specialty station if it programmed a designated minimum amount of foreign language, religious, or automated programming.[2] When the Commission deleted its distant signal carriage limitations in 1982, the Commission also deleted its rule defining a specialty station. This category of stations was no longer needed because there were no longer any rules limiting signal carriage from which exemptions were needed. *Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The Commission continues to utilize the significantly viewed status of signals for various purposes, such as exemption from the Commission's program exclusivity rules. 47 C.F.R. §§76.92(f), 76.156(a). On the other hand, the Copyright Office has continued to recognize specialty status for purposes of determining royalty payment rates, the carriage of specialty stations by cable systems incurring lesser fees than the carriage of other distant stations. Similar treatment is afforded significantly viewed signals by the Copyright Office.

3. In establishing the category of significantly viewed stations, the Commission published a nationwide list, county-by-county, of those stations initially deemed to be significantly viewed. *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d at 378-463 app. B. Stations not included in this list may be added in one of two ways. Any station may demonstrate that it meets the requisite viewership levels utilizing current community-specific data. 47 C.F.R. §76.54(b). Alternatively, a new station, that is a station not operating at the time of the original surveys which established the 1972 list, may utilize county-wide data to establish significantly viewed status, provided that such data is from the station's first three years of operations. 47 C.F.R. §76.54(d). For purposes of this rule, the Commission has extended "new" station status to stations shifting from subscription or noncommercial status to commercial status after the initial survey period.

4. KXTX-TV began operation on February 5, 1968, as Station KDTV. Following donation of the station by Doubleday Broadcasting Company, Inc. to The Christian Broadcasting Company, Inc. in 1973, KXTX-TV began to transmit primarily religious programming, and was thus classified as a specialty station pursuant to former §76.5(kk) of the Commission's Rules.[3] Since 1980, however, KXTX-TV has carried an increasing amount of non-religious programming. KXTX-TV states that a 1989 ruling of the Copyright Office[4] is likely to cause KXTX-TV to lose its specialty station status on January 1, 1991. This change in status, asserts KXTX-TV, entitles the station to be considered a "new" station for purposes of demonstrating that it is significantly viewed pursuant to §76.54 of the Rules. Consideration as a "new" station, KXTX-TV notes, would allow it to utilize county-wide data from its first three years of operation as a "new" station, rather than community-specific data, in making the required significantly viewed showing.

5. In support of its petition, KXTX-TV states that, despite its loss of specialty status, it continues "to present only family-oriented entertainment programming and a considerable amount of religious programming," and does not accept alcoholic beverage advertising.[5] In the face of "increased competition and a financially depressed local market," the station's revenues have continuously declined, decreasing 21% from 1985 to 1989.[6] KXTX-TV's cash flow, states the station, has also been negative. According to KXTX-TV, cable carriage in the outlying areas of the Dallas-Fort Worth, Texas market -- those counties in which KXTX-TV seeks to be declared to be significantly viewed -- is critical to improving the station's financial lot. KXTX-TV asserts that once it loses its specialty status in 1991, cable systems in counties in whole or in part beyond the the station's Grade B contour will drop KXTX-TV rather than pay a 3.75% copyright fee to carry it. Therefore, claims KXTX-TV, it needs to obtain a declaration of significantly viewed status, and to that end submits data from Arbitron's *1989 County Coverage Surveys, Cable-Controlled*, as follows:

County	Share of Total Viewing Hours	Net Weekly Circulation
Fannin	6	22
Grayson	4	44
Hunt	3	34
Henderson	6	43
McLennan	2	14
Navarro	3	30
Parker	3	32

As KXTX-TV notes, these figures meet or exceed the definition of significantly viewed for an independent station: a 2% share of total viewing hours and a net weekly circulation of 5%. 47 C.F.R. §76.5(i).

6. As justification for its use of county-wide audience data, KXTX-TV argues that the ruling of the Copyright Office respecting KXTX-TV's specialty status is directly analogous to other status changes which the Commission has recognized warrant considering a station "new" for purposes of §76.54 of the Rules, citing, *e.g., HR Broadcasting Corp. of Milwaukee, Inc. (WCGV-TV)*, Cable Television Actions Report No. 3212 (released April 10, 1989) (STV to commercial); *Golden West Broadcasters of Oklahoma, Inc. (KAUT)*, Cable Television Actions Report No. 3110 (released September 8, 1987) (STV to commercial); *Independent Broadcasting Company (KOLR-TV)*, 54 RR 2d 712 (1983) (technical improvements); and *Calvert Telecommunications Corporation d/b/a CALTEC*, 63 FCC 2d 1022 (1977) (technical improvements). Accordingly, KXTX-TV seeks to be treated as a "new" station, allowing it to utilize county-wide data pursuant to §76.54(d) of the Commission's Rules. Further, KXTX-TV contends that its upcoming loss of specialty station status is too abrupt to permit it the time necessary to conduct community-specific surveys, particularly given the speed with which cable operators will move in making carriage decisions where copyright royalty fees are involved. Petitioner notes, in this regard, that it cannot afford to lose cable carriage in its market, particularly in the outlying counties in which the station's programming is most appealing. In any event, KXTX-TV asserts that community-specific audience surveys would be prohibitively expensive--costing approximately $150,000 according to an estimate obtained by the station from VideProbeIndex, Inc. ("VPI"). Finally, petitioner notes that one of its competitors, Television Broadcast Station KXTA (Ind., Channel 21), Fort Worth, Texas, has sought significantly viewed status based upon county-wide data in several of the counties in which KXTX-TV seeks this status.[7] It would not be fair to prevent KXTX-TV from also using county-wide data, contends the station, particularly as its own viewership levels exceed those for KXTA in some cases.[8]

7. In opposition to KXTX-TV, KDAF argues that by KXTX-TV's own admission, its programming changes upon which a loss of specialty status should be based occurred by 1981, and thus the station has had a full decade in which to demonstrate that it is significantly viewed. In addition, KXTX-TV has been on notice for over two years that the Copyright Office would no longer consider the station a specialty station, pursuant to the Copyright Office's initial interpretation, *Inquiry in Docket No. RM 87-7*, 53 FR 5591 (1988), formally adopted last fall, *Policy Decision in Docket No. RM 87-7*, 54 FR 38461 (1989). Not only can KXTX-TV not claim surprise at its exclusion from the Copyright Office's revised list of specialty stations, *Cable Compulsory License; Specialty Station Determination: Preliminary Findings and Request for Comments*, 55 FR 12575 (1990), KDAF argues that KXTX-TV did not even petition to be included in the revised list. KXTX-TV could have avoided its perceived hardships, which in fact, contends KDAF, may not be as great as assumed. KDAF notes that the affidavit from VPI submitted by KXTX-TV indicates that community survey results can be ready for filing by September 25, 1990, well in advance of January 1, 1991, which in fact may be six months prior to the date by which cable systems will make carriage decisions based upon the rules and regulations of the Copyright Office. In any event, states KDAF, if KXTX-TV's programming is as popular as the station believes, it should be able to arrange easily for its continued cable carriage. KXTX-TV is a commercial station competing in its marketplace, notes KDAF, and it is not the duty of the Commission to protect an individual licensee's financial health.

8. Nor does it appear, KDAF argues, that the cost to KXTX-TV of community-specific surveys would in fact be $150,000. Based upon VPI's own report, and excluding systems exempt from the Copyright Office's 3.75% fee, KDAF suggests the cost of necessary surveys is in fact less than $25,000, a cost that could be borne in part by affected area cable operators. Even if the systems subject to the Copyright fee were to drop KXTX-TV, this would amount to a loss of only 11,000 cable subscribers in Athens and Greenville, Texas, contends KDAF, a total not likely to impact KXTX-TV adversely. That KTXA is using county-wide data is irrelevant, asserts KDAF. The rules permit KTXA to use such data, as a new station commencing operations subsequent to the Commission's establishing its initial list of significantly viewed stations in the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378-463 app. B (1972). 47 C.F.R. §76.54(d). KXTX-TV was on the air at the time of the Commission's surveys establishing this list, and thus must now demonstrate significantly viewed status using community-specific data. 47 C.F.R. §76.54(b). KXTX-TV's programming changes do not warrant treating KXTX-TV as a "new" station, argues KDAF. Granting KXTX-TV's petition, KDAF contends, would eviscerate the rule KXTX-TV seeks to waive.

9. In reply to KDAF, KXTX-TV argues that it has amply justified its waiver request, and that KDAF refutes neither the Arbitron data nor KXTX-TV's financial data. A station's financial situation is relevant in waiver proceedings, KXTX-TV contends, citing *KOIN - TV, Inc.*, 93 FCC 2d 186 (1983) and *Fresno Cable TV Co., Inc.*, 48 FCC 2d 116 (1974). KXTX-TV's money will be better spent on providing diverse programming than on conducting unnecessary surveys. KXTX-TV disputes KDAF's analysis of VPI survey needs and costs, but notes that in any event, the surveys would still cost KXTX-TV thousands of dollars. KXTX-TV had no need to conduct any surveys prior to April of this year, states the station, and even if KDAF's postulated June 30, 1991 date is correct for cable systems' carriage decisions, there is no guarantee that Commission action or necessary negotiations with cable systems could be completed even by then. Grant of KXTX-TV's waiver would be in the public interest, argues the station, and will not undermine §76.54 of the Rules.

10. On September 19, 1990, the staff directed an inquiry to KXTX-TV, seeking to clarify certain matters raised in its petition. Specifically, the staff requested "[t]he exact date of KXTX-TV's loss of specialty station status pursuant to Commission rules and policies." KXTX-TV replied on October 15, 1990, stating that this is "not legally relevant." The loss of status, according to KXTX-TV, is due to rules and regulations of the Copyright Office, and will occur on January 1, 1991. KXTX-TV nevertheless states in its letter that "the last year in which [it] programmed one-third of both its prime time and average week with religious programming was 1980." Even if the Commission considers this relevant, KXTX-TV asserts, it still should be allowed to use current coun-

ty-wide data to demonstrate the station's significantly viewed status. Such data would, like the required community-specific data, be current, and would also be more accurate than data from earlier years, states KXTX-TV, particularly given the station's 1981 technical improvements. In addition, contends KXTX-TV, though the Commission in other cases has required data from a three-year period immediately following a change in station operations to determine the station's significantly viewed status, radical changes were made by these stations, a factor not present in KXTX-TV's case. KDAF commented on this letter, arguing that the facts set forth demonstrate no need for relief. KXTX-TV responded, continuing to urge swift relief.

11. KXTX-TV misapprehends the underlying rationale of what constitutes a "new" station for purposes of §76.54 of the Rules. In those cases in which we have permitted stations already on the air to be treated as "new" for such purposes, the station in question had done more than merely seek to offer programming thought to be more attractive to its existing potential audience base. Rather, the station had undergone very extensive technical improvements so as to increase significantly its coverage potential, *e.g., Independent Broadcasting Company, supra*; *CALTEC, supra*, or alternatively, the station had switched from an STV or non-commercial mode of operations to a commercial mode of operations, *e.g., HR Broadcasting Corp. of Milwaukee, Inc., supra* (STV); *Golden West Broadcasters of Oklahoma, Inc., supra* (STV); *Blair Broadcasting of Oklahoma, Inc. (KOKH - TV)*, Cable Television Actions Report No. 2800 (released October 14, 1983) (non-commercial), changes which altered the basic terms of providing its broadcast service.[9] In the present case, however, KXTX-TV has merely decided to offer different programming to its existing potential audience base. In fact, KXTX-TV states that it continues to present only "family-oriented" and religious programming, and that its program content changes are not radical. Determining when changes in entertainment format are substantial enough to warrant categorization as a "new" station would reinvolve the Commission in subjective judgments, from which it has previously sought to extricate itself. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Moreover, we have previously established that a change in network affilation and in non-network program offerings were insufficient to warrant an existing station's loss of significantly viewed status. *Boston Broadcasters, Inc.*, 42 FCC 2d 669 (1973). We see no reason today why a similar change in program content should warrant treatment as a "new" station for purposes of establishing significantly viewed status. Moreover, KXTX-TV's assertions notwithstanding, for purposes of the Commission's rules and policies, a station's status -- as a specialty station or otherwise -- is to be determined by the rules and policies of this Commission. What is relevant to this determination in the present case is not how another federal agency has chosen to treat KXTX-TV, but when KXTX-TV ceased to broadcast a programming format that met the standards of former §76.5(kk) of the Rules.[10] This occurred, by KXTX-TV's own admission, by May 1980. This, then, would be the relevant date at which KXTX-TV would be considered to have become a "new" station, if we were to find that a change in programming format warranted such treatment. The survey data submitted by KXTX-TV would, therefore, be unavailing even were the station declared "new."

12. Although we have determined that KXTX-TV's change of program content does not entitle it to be treated as a "new" station for purposes of demonstrating significantly viewed status, KXTX-TV may still seek a waiver of §76.54 of the Rules on other grounds. As we have previously stated, "our Rules are not so inflexible that they cannot be waived to meet a unique situation. . . ." *Amherst Cablevision, Inc.*, 60 FCC 2d at 746. Nevertheless, "[a]n applicant for waiver faces a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D. C. Cir. 1969). "[S]imply submitting a showing that purports to demonstrate the requisite [need] does not satisfy the burden of proof." *Pappas Television, Inc.*, 61 FCC 2d 1051, 1056 (1976). In the present case, while KXTX-TV has submitted selected financial data purporting to demonstrate its need for continued cable carriage to be furthered by a declaration of significantly viewed status, we do not find KXTX-TV's showing to be persuasive. KXTX-TV has not rebutted KDAF's analysis of the VPI report, which indicates that the cost to KXTX-TV of any requisite community surveys -- even if the cost is not shared by area cable operators, whose subscribers, KXTX-TV alleges, desire the station's programming -- is less than $25,000. KXTX-TV does not demonstrate that it cannot absorb this incremental cost, nor what impact the cost of improving its facilities in 1981 has had on the station's finances. Indeed, KXTX-TV does not present full financial data, particularly with reference to its cash flow. Nor does KXTX-TV demonstrate what impact, if any, a loss of 11,000 cable viewers (as projected by KDAF) would have on the station. Indeed, KXTX-TV presents only speculation that area cable systems will choose to drop a station allegedly as popular as KXTX-TV is. KXTX-TV has operated and competed in the Dallas - Fort Worth, Texas market for years, and has made its operating and programming decisions presumably in response to the desires of the market's viewers. These decisions, and those of area cable operators concerning the station's carriage, are not decisions this Commission should attempt to alter without a showing of a convincing public interest reason to do so. KXTX-TV has simply failed to present "a substantial showing containing specificity of fact," *Continental Cablevision of Lansing, Inc.*, 57 FCC 2d 86, 89 (1975), to convince us that any determination by the Copyright Office as to how that agency will treat KXTX-TV warrants a waiver of our rules.

13. We note, finally, that KXTX-TV may still seek to demonstrate its status as significantly viewed through current community-specific data, pursuant to §76.54(b) of the Rules.[11] To date, however, KXTX-TV has not done so. Accordingly, we cannot find KXTX-TV to be significantly viewed in Fannin, Grayson, Hunt, Henderson, McLennan, Navarro, or Parker Counties, Texas.

14. In view of the foregoing, we find that grant of KXTX-TV's petition is not in the public interest.

15. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3408) filed May 10, 1990, by KXTX, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] KXTX-TV also seeks significantly viewed status in Montague County, Texas. KXTX-TV is already considered to be significantly viewed in that county, having been found to be so in the Commission's initial survey (as Station KDTV). *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 452 app. B (1972). Consequently, this portion of KXTX-TV's request is dismissed.

[2] Former §76.5(kk) of the Rules defined a specialty station as: "A commercial television broadcast station that generally carries foreign-language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours."

[3] *See Memorandum Opinion and Order in Docket No. 20553*, 60 FCC 2d 661, 670 app. B. (1976).

[4] In 1987, the Copyright Office initiated an inquiry into the status under the copyright rules of stations which had been designated as specialty stations by the FCC in previous years. The Copyright Office concluded in 1989 that stations seeking the benefits of such status from the Copyright Office pursuant to its rules must demonstrate that the stations meet the specialty criteria currently. *Policy Decision in Docket No. 87-7*, 54 FR 38461 (1989). Given its station's increased amount of non-religious programming, KXTX-TV did not seek to demonstrate that is continues to meet the specialty criteria.

[5] KXTX-TV also states that it improved its transmitter and antenna facilities in 1981, boosting its power by 50%, and increasing its Grade B contour coverage area by less than 10%.

[6] In 1985, states KXTX-TV, the station's gross revenues exceeded $16.0 million, while in 1989 its revenues decreased to only $12.7 million. Net losses during this period exceed $11.0 million, with losses in 1989 alone of nearly $5.0 million, including a net write down of program value of $2.4 million. In that same year, KXTX-TV paid only $6.3 million of current program liabilities totalling $16.3 million, including liabilities carried over from prior years.

[7] *TVX of Fort Worth - Dallas, Inc.*, Cable Television Actions Report No. 3282 (released June 6, 1990).

[8] In Grayson County, KXTX-TV achieved a 4% share of total viewing hours and a 44% net weekly circulation in 1989, compared with KXTA's 1983 levels of 3% and 17%. In Hunt County, KXTX-TV achieved a 3% share of total viewing hours and a 34% net weekly circulation in 1989, compared with KXTA's 1983 levels of 2% and 39%. In Navarro County, KXTX-TV achieved a 3% share of total viewing hours and a 30% net weekly circulation, compared with KXTA's 1983 levels of 2% and 30%.

[9] In this regard, we note that in *Blair Broadcasting of Oklahoma, Inc., supra*, the Commission's staff granted a waiver to a non-commercial educational station which had changed to a commercial station, allowing it to use county-wide data during its first three-years of commercial operation. The waiver was based upon the fact that non-commercial educational stations were not included in the Commission's 1972 list of significantly viewed stations. *See* paragraph 3, *supra*. In this instance, however, KXTX-TV was surveyed because it was a commercial station, but was found not to have the necessary audience shares to be included on the 1972 list of significantly viewed stations in the relevant counties.

[10] Of course, once former §76.5(kk) of the Rules was deleted, *see* paragraph 2, *supra*, the concept of specialty status for purposes of the Commission's rules no longer existed.

[11] This does not treat KXTX-TV disparately with respect to KTXA. KXTX-TV was on the air at the time of the Commission's initial determination of significantly viewed signals, and was in fact then found to be significantly viewed in certain counties. *See, e.g.*, note 1, *supra*. KTXA was not then on the air. In addition, KTXA submitted data from its first three years of operation, including viewership surveys from May 1982 to February 1983. *TVX of Fort Worth - Dallas, Inc., supra*. KXTX-TV submits 1989 data to support a change that occurred in 1980. Even were we to consider the change decisional, KXTX-TV's data would be several years too late.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Hughes Communications Galaxy, Inc. File No. 20-DSS-P/LA-90

and

Satellite Transponder Leasing Corporation

Application for Replacement Satellite for SBS-4 and for Modification of Construction Permit and License of Galaxy 6 Satellite

ORDER AND AUTHORIZATION

Adopted: December 28, 1990; Released: January 10, 1991

By the Commission:

INTRODUCTION

1. Hughes Communications Galaxy, Inc. (Hughes) and Satellite Transponder Leasing Corporation (STLC)[1] have applied to construct, launch and operate a hybrid domestic fixed communications satellite to be known as Galaxy 7-H. At 4/6 GHz (C-band), this proposed satellite will be a substitute for Hughes's Galaxy 6 satellite. At 12/14 GHz (Ku-band), the proposed satellite will be a replacement for STLC's in-orbit SBS-4 satellite. Hughes proposes both to sell and lease the transponders on this satellite on a non-common carrier basis. GE American Communications, Inc. (GE Americom) has filed a Petition to Deny Hughes's application. Hughes filed a reply to GE Americom's petition, and GE Americom responded. For the reasons discussed below, Hughes's applications are granted.

2. The C-band portion of the proposed hybrid is to serve as a substitute for the Galaxy 6 satellite. Galaxy 6 -- formerly Westar 6° -- was authorized in 1985 as an emergency replacement for the Westar 6 satellite that was involved in a launch failure the previous year.[2] It was assigned to 91^0 W.L. [3] Recently Hughes was granted authority to operate Galaxy 6 at 99° W.L. for the period between the retirement of its Westar 4 satellite -- which is currently operating at 99^0 W.L. -- in late 1991 and the launch of its replacement Galaxy 4-H hybrid satellite into 99^0 W.L. in 1993.[4] Galaxy 6 was launched in October 1990.

3. The Ku-band portion of Galaxy 7-H is to serve as a replacement for SBS-4 which is currently operating at 91^0 W.L. SBS-4 is licensed to STLC which was recently acquired by Hughes.[5] It is expected to reach its end-of-service life in 1994.[6]

4. Hughes's proposed hybrid satellite will carry 24 12/14 GHz transponders, eight wideband with a bandwidth of 54 MHz and sixteen narrowband with a bandwidth of 27 MHz. Each transponder will have a nominal transmitter output power of 50 watts. The satellite also will carry 24 4/6 GHz transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 16 watts. According to Hughes, this will offer better performance than Galaxy 6 with its ten-watt transponder design. Four transponder channels (2 in the C-band and 2 in the Ku-band) within the communications payload are equipped with "cross-strap" switches, permitting switching among the bands. The 4/6 GHz portion of the satellite will be designed to serve the 48 contiguous United States (CONUS), Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands with a CONUS nominal equivalent isotropically radiated power (E.I.R.P.) of 38.0 dBW. The 12/14 GHz portion will be designed to serve all of the above areas in the receive pattern and CONUS in the transmit pattern with a nominal E.I.R.P. of 45.0 dBW. The satellite will have the capability to switch four specific transponder channels from CONUS coverage to CONUS plus off-shore coverage to serve Alaska, Hawaii, Puerto Rico and the Virgin Islands in the Ku-band transmit beams. Hughes asserts that the design of Galaxy 7-H is in compliance with the Commission's requirements regarding interference and two degree orbital spacing. Hughes proposes to launch its hybrid satellite in December 1992.

5. Hughes states that a hybrid satellite using recently developed technology can better serve the public than two single band satellites. It asserts that cross-strapping techniques and power efficiencies will better satisfy customer demands. In addition, Hughes states that permitting it to launch its hybrid will restore C-band capacity at 91^0 W.L. more quickly than otherwise, because Galaxy 7-H is to be launched in December 1992 whereas Galaxy 6 is not scheduled to be relocated to 91^0 W.L. until July 1993, when it is no longer needed at 99^0 W.L. Hughes also states that the grant of this proposal will not require the assignment of any new orbital locations.

6. GE Americom contends that Hughes's application violates the Commission's orbital assignment policies. According to GE Americom, if Hughes's request is granted, Hughes will be permitted to hold 91^0 W.L. as a "replacement" location despite the fact that Westar 3 is no longer operating at that location and Hughes does not intend to restore regular service there until 1993.[7] GE Americom asserts that this constitutes "warehousing" of an orbital location in contravention of Commission policy. According to GE Americom, grant of Hughes's application would allow it to receive a desirable hybrid location outside of a regular domestic fixed-satellite processing proceeding to the disadvantage of other operators. GE Americom concludes that 91^0 W.L. at C-band should be returned to the pool of locations available for reassignment.

7. GE Americom's second objection is directed to the future use of SBS-4 after Galaxy 7-H is launched as its replacement in the Ku-band.[8] It notes that SBS-4 may have some useful life after Galaxy 7-H is launched, and asserts that any request by Hughes for a new or additional location for SBS-4 should be treated as part of a new domestic fixed-satellite processing round.

DISCUSSION

8. Operating a state-of-the-art hybrid satellite at a particular orbital location may be more efficient than operating two single-band satellites at that location. Construction, launch and operational costs for one, albeit larger, satellite will be lower than for two satellites. Moreover, advances over the past several years have made it possible to construct hybrid satellites that have technical capabilities equivalent to single-band satellites. Thus, hybrid satellites can provide cost savings to operators and customers with no decrease in technical performance. Consequently, in the last domestic fixed-satellite processing group, the Commission attempted to assign operators to corresponding C-band and Ku-band orbital locations, when possible, to provide them the opportunity to construct and launch hybrid satellites in current or future generations.

9. By virtue of its acquisition of STLC, Hughes is assigned to both the C-band and Ku-band portions of the 91^0 W.L. location. Hughes now proposes to operate a hybrid satellite from that location. The proposed satellite fully conforms with the Commission's technical standards, and Hughes meets all financial and legal requirements. However, because the hybrid will not be launched until late 1992 at the earliest, the C-band location at 91^0 W.L. will remain vacant for several years and questions have been raised by GE Americom regarding Hughes's continued assignment to that location. We find that these concerns do not justify denying Hughes's application.

10. We disagree with GE Americom's assertion that Hughes is attempting to "warehouse" an orbital location. Our policy regarding warehousing is designed to prevent orbital locations from being retained by licensees who have not decided whether to proceed with their plans to the exclusion of others who would use the location.[9] This is not the case here. To take advantage of its corresponding locations at 91^0 W.L., Hughes has decided to implement a hybrid satellite, which it plans to launch in December 1992. If Hughes is to meet its proposed launch date, it must begin construction of Galaxy 7-H expeditiously and be provided with some degree of certainty.[10] Hughes appears committed to implementing its satellite as soon as possible and is not holding the location to afford itself additional time to decide whether to proceed.[11]

11. Moreover, operators wishing to replace two single-band satellites with a hybrid satellite may anticipate finding that the end-of-service lives of the single-band satellites do not coincide. Faced with this situation, an operator may launch the hybrid after the first satellite is ready to be retired, thus incurring an economic loss by prematurely terminating service on the other satellite. Alternatively, it may wait to launch the hybrid after both single-band satellites have reached their end-of-service lives and cause a gap in service at that location in one frequency band. The satellite operator is in the best position to weigh the economic tradeoffs involved and, absent overriding public interest considerations, that judgment is entitled to deference.[12]

12. In this case, Hughes has chosen a middle ground and has decided to launch its proposed hybrid satellite in December 1992, two years before SBS-4's license term expires but two years after Westar 3's retirement. While this will mean that Galaxy 7-H will not strictly be a replacement satellite for Westar 3 as we have defined replacement in the past,[13] this conclusion does not require return of this location to the pool of locations available for reassignment, as GE Americom contends. Galaxy 7-H is a replacement satellite for SBS-4 and obviously both C-band and Ku-band portions of the hybrid must be launched at the same time. We find no merit in GE Americom's claim that by launching its hybrid in the time frame proposed in its application, Hughes is attempting to retain desirable orbital locations despite their underuse or nonuse.[14] Hughes's proposed hybrid satellite appears to offer better service potential to its customers and grant will not violate any domestic fixed-satellite policies. As Hughes notes, it will not acquire any additional orbit locations as a result of this proceeding.

13. With respect to GE's concerns about the future disposition of SBS-4, Hughes is correct in stating that this issue is not currently before the Commission. SBS-4 was launched in September 1984 and will presumably have some remaining service life when Galaxy 7-H is launched in late 1992 or early 1993. However, Hughes is on notice that any request for an additional orbit location for SBS-4 will be processed in conformity with our orbital assignment policies and may require institution of a new processing group.

14. In addition, based on Hughes's representations in its application, the proposed transponder transactions will be noncommon carrier in nature.[15] There have been no objections to this request. We find that these transactions are consistent with our transponder sales policies.[16]

CONCLUSION

15. Accordingly, IT IS ORDERED that Application File No. 20-DSS-P/LA-90 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to consolidate its Galaxy 6 and SBS-4 satellites into the hybrid Galaxy 7-H satellite as proposed in its application.

16. IT IS FURTHER ORDERED that construction of Galaxy 7-H shall begin promptly, if it has not already begun, upon release of this authorization. Unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization by the following dates, as certified in writing to the Commission by the licensee:

	Construction Commenced not Later than:	Construction Completed not Later than:	Launched not Later than:
Galaxy 7-H	January 1991	January 1993	March 1993

17. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to sell all of the transponders on Galaxy 7-H in accordance with Commission policies articulated in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), *aff'd sub nom., Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

18. IT IS FURTHER ORDERED that the Orbital Assignment Plan set forth in the Appendix to *Assignment of Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972 (1988), modified, 5 FCC Rcd 179 (1990), further modified in *American Satellite Company*, 5 FCC Rcd 1186 (Com. Car. Bur. 1990), in *GTE Spacenet Cor-*

poration, 5 FCC Rcd 1182 (Com. Car. Bur. 1990), and *Hughes Communications Galaxy, Inc.* 5 FCC Rcd 3423 (Com. Car. Bur. 1990), IS FURTHER MODIFIED to assign Galaxy 7-H to 91^0 W.L.

19. Hughes Communications Galaxy, Inc. is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that time period will constitute formal acceptance of this authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] After this application was filed and pursuant to Commission consent, control of STLC was transferred to Hughes from International Business Machines Corporation (IBM). *See* International Business Machine Corporation, 5 FCC Rcd 1655 (Com. Car. Bur. 1990). We will refer to the applicant as Hughes.

[2] The satellite was to be launched initially in 1986, but due to the series of launch failures and disruption in launch services that year it could not be launched on schedule. Western Union and Hughes were subsequently granted additional time in which to launch the satellite.

[3] *See* The Western Union Telegraph Company, Mimeo No. 6929 (released September 11, 1985). The satellite's name was changed to Galaxy 6 when Hughes acquired Western Union's domestic fixed-satellite system in 1988. *See* Western Union Corporation, 3 FCC Rcd 6792 (Com. Car. Bur. 1988). C-band capacity at 91-S W.L. has not been used since Westar 3 was retired in February 1990.

[4] Hughes Communications Galaxy, Inc. 5 FCC Rcd 4497 (Com. Car. Bur. 1990). *See also* Hughes Communications Galaxy, Inc., 5 FCC Rcd 3423 (Com. Car. Bur. 1990) (*Galaxy 4 - H Order*). Hughes has acknowledged that any request for a new location for Galaxy 6 after Galaxy 4-H is launched may trigger a new domestic fixed-satellite processing group.

[5] *See* note 1, *supra*.

[6] Hughes has requested that any license for Galaxy 7-H be issued in the name of Hughes alone. *See* Amendment filed August 14, 1990.

[7] Replacement satellites are those that operators launch into the same locations as existing satellites that are reaching their end-of-service lives. This enables customers to continue to be served without interruption or need to repoint their antennas. To provide operators with some assurance that they will be able to continue to serve their customers, replacement satellites are generally authorized provided that the location remains available for assignment to a U.S. satellite and provided that the technical characteristics of the proposed replacement allow it to be assigned to that location (*e.g.*, high power density satellites may need to be assigned to a different portion of the orbital arc). *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at paras. 26-27; Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6973, 6976 n. 31 (1988).

[8] GE Americom also objects to Hughes' statement that it may locate Galaxy 6 at 72^0 W.L. after it is no longer needed at 99^0 W.L. because GE Americom's Satcom 2R satellite is currently located at 72^0 W.L. However, Hughes, in its Reply, clarified that the reference to 72^0 W.L. was an error and that it was suggesting possible relocation of Galaxy 6 to 74^0 W.L., not 72^0 W.L., as a replacement for Galaxy 2.

[9] *See generally*, Licensing of Space Stations in the Domestic Fixed-Satellite Service, *supra* note 7, at paras. 16-25. *See also Galaxy 4 - H Order*, *supra* note 4 at para. 11.

[10] Generally, it takes several years to construct a space station.

[11] In this regard, Hughes requested and was granted a Section 319(d) waiver to begin construction of Galaxy 7-H at its own risk prior to Commission action on its underlying application for a construction permit. *See* Letter from Chief, Domestic Facilities Division to James F. Rogers, June 25, 1990.

[12] The Common Carrier Bureau recently granted an extension of a C-band launch date when an applicant sought to launch a new hybrid satellite in conformance with the Ku-band deadline, although no gap in service was involved. *Galaxy 4-H Order, supra* note 4.

[13] *See* discussion, *supra* note 7.

[14] GE Americom's Petition to Deny at 4.

[15] Hughes's Application at 4, 57.

[16] *See* Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.*, Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., FCC 86-232 (June 10, 1986). Because all of the transponders on SBS-4 and ten of the twenty-four transponders on Galaxy 6 have already been authorized for noncommon carrier service, our action on this application results in the authorization for sale of only an additional fourteen C-band transponders.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION, SATELLITE BUSINESS SYSTEMS, WESTERN UNION INTERNATIONAL, INC.,
Complainants,

v.

GTE NORTH INCORPORATED,	File No. E-90-412
GTE ALASKA INCORPORATED,	File No. E-90-413
GTE CALIFORNIA INCORPORATED,	File No. E-90-414
GTE FLORIDA INCORPORATED,	File No. E-90-415
GTE NORTHWEST INCORPORATED,	File No. E-90-416
GTE SOUTH INCORPORATED,	File No. E-90-417
GTE SOUTHWEST INCORPORATED,	File No. E-90-418
GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED,	File No. E-90-419

Defendants.

ORDER

Adopted: January 3, 1991; Released: January 10, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1990, MCI Telecommunications Corporation, Satellite Business Systems and Western Union International, Inc. (hereinafter the "Complainants") filed the above-captioned formal complaints against GTE North Incorporated, GTE Alaska Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, and GTE Hawaiian Telephone Company Incorporated (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On December 27, 1990, however, Complainants and Defendants filed a joint motion for dismissal of the complaints with prejudice stating that the parties had reached an agreement to settle the differences underlying the actions and, as a result, the complaints had become moot.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that Complainants' and Defendants' Joint Motion for Dismissal of Complaint IS GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

ORDER ON FURTHER RECONSIDERATION

Adopted: December 21, 1990; Released: January 10, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order considers a petition for partial reconsideration of the Commission's *Order on Reconsideration* [1] which modified aspects of its *Strategic Pricing Order*.[2] The petition was filed by Ad Hoc Telecommunications Users Committee (Ad Hoc). [3] Ad Hoc principally requests that the Commission alter the determination, first announced in the *Strategic Pricing Order* and affirmed upon reconsideration, to use a range of presumed reasonableness to compare and evaluate special access rates for voice grade (VG) and high capacity (HiCap) services. For the following reasons, the Common Carrier Bureau dismisses this petition in accordance with Section 1.429(i) of the Commission's Rules.

II. BACKGROUND

2. The *Strategic Pricing Order* addressed the efforts of local exchange carriers (LECs) to price their HiCap services at levels that reflected strategic objectives as well as relative cost. The Commission determined that LEC strategic pricing of VG and HiCap services to discourage bypass of local carrier networks and the migration from VG to HiCap services could be reasonable under certain circumstances. *Strategic Pricing Order*, 4 FCC Rcd at 4804. The record before the Commission demonstrated that the cost of one HiCap circuit was typically equivalent to the cost of six 4-wire VG circuits. Using that six-to-one crossover point to define the center of the range, the Commission concluded that rates for HiCap facilities that were no less than four times and no more than eight times the rate of a 4-wire VG circuit would not require a special justification in the future. *Id.*

3. The *Reconsideration Order* held that changed circumstances had removed any justification for strategic pricing. Instead, LECs would now be required to "implement more fully cost-based pricing of special access service." *Reconsideration Order*, 5 FCC Rcd at 408. The Commission reaffirmed prospective reliance on the crossover range to assess the lawfulness of special access rates. *Id.*

4. Ad Hoc argues that the crossover range is not based on the record and is an unreasonable approximation of cost-based pricing. *See* Ad Hoc Petition at 4-7. Ad Hoc contends that the use of any range is unsound and should be replaced by a truly cost-based method for analyzing a rate's reasonableness. *Id.* at 9. According to Ad Hoc, the Commission's rationale for relying on the crossover range had been the need to manage demand migration from VG to HiCap services. *Id.* at 10. Ad Hoc argues that, because the Commission determined, in the *Reconsideration Order*, that demand migration management no longer justifies strategic pricing, the rationale for using a crossover range has been eliminated. Ad Hoc urges that if the crossover range remains, the Commission should require the filing of service specific, as well as rate element specific, cost data. *Id.* at 18.

III. DISCUSSION

5. Our review of Ad Hoc's petition reveals that most of its contentions merely repeat arguments raised in its initial petition for reconsideration filed in this proceeding on January 3, 1989 (Ad Hoc 1989 Petition). For example, in its initial petition for reconsideration as well as here, Ad Hoc argued that the record did not support a six-to-one crossover. *Compare* Ad Hoc Petition at 4 *with* Ad Hoc 1989 Petition at 20-22. Ad Hoc also repeats its argument that a crossover range is an improper tool for the analysis of rates. *Compare* Ad Hoc Petition at 8-12 *with* Ad Hoc 1989 Petition at 6-7, 9-10. Furthermore, Ad Hoc argues in both petitions that the use of actual cost data is the proper method for establishing special access rates. *Compare* Ad Hoc Petition at 13-16 *with* Ad Hoc 1989 Petition at 7-10.

6. The *Reconsideration Order* fully considered the merit of these Ad Hoc arguments. The Commission rejected them at that time, and Ad Hoc has presented no procedural or substantive basis for now doing otherwise. Accordingly, we dismiss Ad Hoc's petition to the extent it repeats its previously unsuccessful arguments. *See* 47 C.F.R. §§ 1.106(k)(3), 1.429(i).

7. Upon review of the balance of Ad Hoc's petition, we conclude that none of the arguments are a proper subject for a petition for further reconsideration. Section 1.429(i) of the Commission's Rules specifies that:

> Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, *to the extent of such modification*, subject to reconsideration in the same manner as the original order.

47 C.F.R. § 1.429(i) (emphasis added). Thus, under the Commission's rules, the *Reconsideration Order* is itself subject to reconsideration only to the extent that the Order modified the *Strategic Pricing Order*. Ad Hoc's arguments concern aspects of the *Reconsideration Order* that did not modify the *Strategic Pricing Order*. Therefore, Ad Hoc's arguments addressing reliance on the crossover range to evaluate future tariff filings are not a proper subject for further reconsideration.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the petition for partial reconsideration filed in the above-captioned proceeding by Ad Hoc Telecommunications Users Committee IS DISMISSED for the above noted reasons.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order on Reconsideration, 5 FCC Rcd 400 (1990) (*Reconsideration Order*).

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*).

[3] On March 7, 1990, comments in support of Ad Hoc's petition were filed by the American Petroleum Institute, Aeronautical Radio, Inc., and the Independent Data Communications Manufacturers Association, Inc. The Ameritech Operating Companies and Pacific Telesis filed oppositions to the Ad Hoc petition on that date.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 2, 1991

Released: January 10, 1991

8910-KMS

Vincent J. Curtis, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036-2679

In re: WAPA(AM), San Juan, Puerto Rico — File No. BAL-900723EA

Dear Mr. Curtis:

This is in reference to the above-captioned application for assignment of license of station WAPA(AM), San Juan, Puerto Rico, from Hearst Radio, Inc. to Carlos J. Colon Ventura and Wifredo G. Blanco Pi, a General Partnership ("VBP"). Mr. Blanco Pi, a principal of the proposed assignee, is also the licensee of WMTI(AM), Morovis, Puerto Rico, and grant of the instant application would result in a violation of 47 C.F.R. Section 73.3555 (a)(1) due to the overlap of the 5 mV/m service contours of both stations.[1] Accordingly, you have requested a twelve-month waiver of Section 73.3555(a)(1) in order to allow time for Mr. Blanco Pi to divest WMTI(AM) in an orderly manner.

In support of your waiver request, you assert that the overlap area is well served by other media;[2] that the respective communities of license, Morovis and San Juan, Puerto Rico, are approximately 25 miles apart and constitute separate radio markets; that until WMTI is sold, the two stations will be operated as separate facilities; and that grant of the temporary waiver would "foster the acquisition by a minority entity of an AM station in Puerto Rico's largest broadcast market." In this regard, you note that VBP is a 100% Hispanic-controlled entity. You further note that Mr. Blanco Pi is "presently in negotiations to sell WMTI" to a qualified purchaser.

The ultimate objectives of the Commission's multiple ownership rules are to promote economic competition and diversity of programming and viewpoints in order to further the public interest. *See Amendment of Section 73. 3555 of the Commission's Rules*, 4 FCC Rcd 1723 (1989), *recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989); *Multiple Ownership Rules*, 97 FCC Rcd 997 (1984), *recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns. Before such a waiver can be granted, even on a temporary basis, an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule.

On the basis of the representations before us and the circumstances of this case, we find that a temporary waiver of the overlap prohibitions contained in our multiple ownership rules would be consistent with the public interest and precedent. The San Juan and Morovis markets are separate and are well served by an abundance of various media services, and the waiver sought is for a limited period. In addition, until WMTI is sold, the two stations will be operated as separate facilities. Furthermore, negotiations are already underway for the sale of WMTI. In similar circumstances, the Commission has granted temporary waivers of the contour overlap provisions of the multiple ownership rules. *See KRTH (AM)*, 5 FCC Rcd 2059 (1990); *KKWM (AM)*, FCC 90-352, released October 26, 1990. We are therefore persuaded that no undue concentration of media would result by grant of the temporary relief requested.

Accordingly, the contour overlap provisions of 47 C.F.R. Section 73.3555(a)(1) ARE HEREBY WAIVED in accordance with VBP's request. Moreover, finding that the applicants are fully qualified and the public interest would be served thereby, the application (File No. BAL-900723EA) for assignment of license of WAPA(AM), San Juan, Puerto Rico from Hearst Radio, Inc., to Carlos J. Colon Ventura and Wifredo G. Blanco Pi, a General Partnership, IS HEREBY GRANTED. [3]

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 73.3555 states in pertinent part: (a) No license for an AM . . . broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls one or more broadcast stations in the same service and the grant of such license will result in:

(1) Any overlap of the predicted or measured 5 mV/m groundwave contours of the existing and proposed AM stations.

[2] Specifically, you represent that the overlap area is served by 17 AM stations with between 0.5 mV/m and 8 mV/m average signal strength; by 22 FM stations; by 12 TV stations and 1 CATV system; and by 3 weekly and 4 daily newspapers.

[3] The Chief, Mass Media Bureau, is hereby delegated authority to act on requests for temporary waiver of the contour overlap provisions of 47 C.F.R. Section 73.3555 for the AM, FM and TV services when the requests are for twelve months or less, consistent with precedent, and involve no new or novel issues. In such cases, applicants will be required to demonstrate that efforts have been undertaken to effect the sale of the station to be divested.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 21, 1990

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE MEETING

A meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

January 31, 1991
10:00 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-7792.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the
Authorized Rate of Return
for the Interstate Services
of Local Exchange Carriers

ERRATUM

Released: December 21, 1990

1. On December 7, 1990, the Commission released an Order represcribing the authorized rate of return for interstate services.[1] Appendix F, page 8 of the Order has several headings mislabeled as thousands of dollars. These headings should be millions of dollars. In addition, Appendix G of the Order was inadvertently omitted from publication. By this erratum, a revised Appendix F, page 8 and Appendix G are included as part of the Order.

2. The Order failed to state that a summary would be published in the Federal Register. Accordingly, the following paragraph is added:

> 241. IT IS FURTHER ORDERED, That the Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, FCC 90-315 (released December 7, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GILLETT BROADCASTING
OF MARYLAND, INC.
(Assignor)

and File No. BALCT-900810KE

SCRIPPS HOWARD
BROADCASTING COMPANY
(Assignee)

For Consent to the Assignment
of the License of WMAR-TV,
Baltimore, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1990 Released: December 19, 1990

By the Commission:

1. The Commission has before it for consideration an application to assign the license of television station WMAR-TV (NBC, Channel 2), Baltimore, Maryland, from Gillett Broadcasting of Maryland, Inc. ("Gillett") to Scripps Howard Broadcasting Company ("Scripps"), which is also the licensee of station WBSB(FM), Baltimore, Maryland. The acquisition of WMAR-TV by Scripps will result in a television/radio combination where the Grade A contour of the television station encompasses the city of license of the radio station. Such television/radio combinations are generally inconsistent with the one-to-a-market provisions of Section 73.3555(b) of the Commission's Rules. Accordingly, Scripps has requested a waiver pursuant to Note 7 of the rule. A petition to deny the assignment was filed by Chesapeake Television, Inc. ("Chesapeake"), licensee of WBFF(TV)(Ind./Fox, Channel 45), Baltimore, Maryland, and Scripps filed a reply.

2. In support of its waiver request, Scripps notes that the Commission stated that it would "look favorably upon" and would be "predisposed to grant" requests for waiver of the one-to-a-market rule "when the radio and television stations involved are located in the top 25 ADI television markets as defined by Arbitron Rating Company and in addition where, following the proposed combination, there will remain at least 30 separately owned, operated and controlled broadcast licensees or 'voices.'" *Amendment of Section 73.3555*, 4 F.C.C. Rcd. 1741, 1751, *reconsidered in part*, 4 F.C.C. Rcd. 6489 (1989) (*Second Report and Order*). Scripps further states that Arbitron ranks Baltimore, Maryland as the 22nd largest market. Scripps also notes that, after the proposed purchase, there will be 35 separate broadcast voices in that market. Thus, Scripps states that, because this case falls within the presumptive waiver standard established by the Commission in the *Second Report and Order*, we should grant the requested waiver.

3. In its petition to deny, Chesapeake asserts that several facts exist in this case that raise serious questions concerning the propriety of approving the WMAR-TV assignment application. First, Chesapeake states that the Baltimore market is on the outer limits of the Commission's "Top 25 Markets/30 Voices" presumption, being the 22nd market with 35 voices, and that it is far outside the "65 Stations/45 Voices" standard suggested as the appropriate rule by Commissioner Dennis in her dissent in the *Second Report and Order*. Chesapeake also notes that the Commission's determination in the *Second Report and Order*, to draw the line at the top 25 markets/30 voices, was based on the fact that the average number of broadcast stations in the top 25 markets includes 13.4 television stations, 29.8 commercial AM stations, and 29.2 commercial FM stations. Thus, Chesapeake states that the circumstances existing in the Baltimore market, which has just over half as many broadcast stations as the "average" top 25 market, were not contemplated by the Commission in the *Second Report and Order*.

4. Next, Chesapeake contends that the combination proposed by Scripps, which is composed of an NBC affiliate (VHF) with the most desirable channel position and a Class B commercial FM station, as opposed to a UHF/AM combination, would reduce diversity over a broad area. Moreover, Chesapeake asserts that grant of the proposed combination would harm diversity of views on Baltimore issues because there are only 28 stations licensed to serve Baltimore itself, which are operated by only 22 "voices," nearly one-third less than the Commission deemed to be sufficient in the *Second Report and Order*. Chesapeake also asserts that the proposed combination would cause severe "competitive dislocation." Specifically, Chesapeake states that the cross-promotion resulting from approval of the proposed assignment will further tilt the market in favor of the network affiliates to the competitive disadvantage of the independent stations, especially in light of the facts that three of the five commercial television stations in the Baltimore market are already VHF network affiliates and that the CBS affiliate is already cross-owned with a powerful AM/FM combination. Chesapeake also states that the approval of this assignment would set a precedent that will lead to further concentration in the Baltimore market as other stations attempt to create new combinations. These future combinations, Chesapeake contends, will further threaten the viability of independents, thereby ultimately reducing diversity. Finally, Chesapeake states that no public interest benefits will be generated by grant of the instant waiver request. In support of this contention, Chesapeake alleges that neither station needs the other's help to survive or to provide better programming.

5. In its opposition, Scripps argues that Chesapeake's petition merely reargues against the Commission policy adopted in the *Second Report and Order*, which adopted the new Note 7 to Section 73.3555 of the Rules. Moreover, Scripps states that Chesapeake has pleaded no specific facts to show why the general presumption should not apply in this case.

DISCUSSION

6. In the *Second Report and Order,* we set out standards for reviewing requests for waivers of the one-to-a-market rule. We concluded that we would look favorably on waiver requests in the top 25 markets, where 30 or more voices would remain after the proposed combination. 4 F.C.C. Rcd. at 1751. Because Scripps has established that Baltimore is the 22nd largest market, and that there will be more than 30 separate voices in the market after the proposed assignment, a fact which Chesapeake does not dispute, Scripps meets the standard.[1] We further agree with Scripps that Chesapeake has largely reargued points specifically considered and discussed fully in the *Second Report and* Order, rather than stating specific facts to rebut the presumption that grant of the instant assignment would be in the public interest.

7. In establishing the "Top 25 Markets/30 Voices" presumption, we stated that "[a]lthough liberalizing the radio-TV cross ownership rule may affect diversity of ownership to some minimal degree even in markets with many separate licensees, we believe that any such effect must be weighed against the efficiency gains, cost savings and other benefits of allowing such combinations." *Second Report and Order,* 4 F.C.C. Rcd. at 1752, para. 83. We also note, contrary to Chesapeake's suggestion, that there is nothing in the *Second Report and Order* indicating that we would evaluate a waiver request involving the 22nd ranked market any differently than the 1st ranked market. Moreover, Chesapeake's argument that the Baltimore market is not representative of other top 25 markets in that it has less than the so-called "average" number of voices, discussed in the *Second Report and Order,* is likewise inapposite. While we did compute and identify the average number of voices in the top 25 markets in the *Second Report and Order,* we did not utilize that data to determine the cutoff number for purposes of evaluating waiver requests. Rather, we cited the data to demonstrate the increasing availability of media outlets in top 25 markets generally. 4 F.C.C. Rcd. at 1743, para. 14. Thus, the fact that the Baltimore market may or may not have the same number of broadcast stations as an average top 25 market is not of decisional significance here, where both the top 25 market and 30 voices factors are met.

8. With respect to Chesapeake's argument involving the distinction between VHF/FM combinations and UHF/AM combinations, we note that this also was discussed in the *Second Report and Order.* We specifically considered limiting one-to-a-market waivers to specified media combinations, *e.g.* UHF/AM, but determined that such a limitation "overemphasizes the possible adverse impact that local FM-VHF TV combinations would have on economic competition or viewpoint diversity relative to that of AM and UHF TV combinations and, in that sense, would unjustifiably prevent the public and broadcasters from taking advantage of the efficiencies [including cross-promotion] inherent in joint FM-VHF TV operations." 4 F.C.C. Rcd. at 1750, para. 72. While we stated in the *Second Report and Order* that we would evaluate the types of facilities at issue under our case-by-case analysis, such an evaluation is not relevant under the top 25 market/30 voices presumption, in the absence of specific relevant rebuttal facts. *Compare id.* at para. 84 with *id.* at para. 91.

9. We also find that Chesapeake's arguments regarding the negative effects of such mergers on independent stations are speculative. Moreover, Chesapeake merely speculates that there will be no public interest benefits from the proposed combination because both stations are financially sound. Again, we note that while we stated in the *Second Report and Order* that specific effects on competition and specific evidence on public interest benefits would be part of the case-by-case analysis, such evaluations are not relevant under the 25 market/30 voices presumption in the absence of specific relevant rebuttal facts. *Compare id.* at para. 84 with *id.* at paras. 91 and 92. It is simply not sufficient to rebut the presumption by speculative suggestions that a waiver might not be justified under the case-by-case approach.

10. In view of the foregoing, we find that Chesapeake has failed to present a substantial and material question of fact that grant of the instant assignment application would be inconsistent with the public interest. Accordingly, IT IS ORDERED, That the petition to deny filed by Chesapeake Television, Inc., IS DENIED.

11. Further, having concluded that the applicants are fully qualified, we find that a grant of the captioned assignment application pursuant to Note 7 of Section 73.3555 of the Commission's Rules would be in the public interest. Therefore, IT IS ORDERED, That the above-captioned application (BALCT-900810KE) for consent to the assignment of the license of WMAR-TV, Baltimore, Maryland, from Gillett Broadcasting of Maryland, Inc. to Scripps Howard Broadcasting Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] We also note that in determining the number of voices, we will look at the market as a whole, in accordance with the *Second Report and Order,* rather than any particular local community in the market, as suggested by Chesapeake.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION — File No. I-T-D-90-011

Application for Authority to Discontinue the Provision of International Telex Service

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 21, 1990; Released: December 28, 1990

By the Chief, Common Carrier Bureau:

THE APPLICATION

1. On August 10, 1990, the Western Union Corporation (WUC) filed an application requesting authority for the discontinuance of its international telex authorizations. WUC also requested waivers of the 120 day notice requirement set forth in Section 63.10(c) of the Commission's Rules and the content of notice requirement set forth in Section 63.71(b) of the Rules, 47 C.F.R. §§ 63.10(c) and 63.71(b). The application was placed on public notice on August 22, 1990. No comments were received in response to the public notice.

2. WUC states that it is engaged in financial restructuring which is necessary because it faces both near-term and long-term liquidity crises resulting from annual cash interest obligations that cannot be supported by WUC's operating cash flow. In order to protect its core business and to acquire vitally needed additional capital, WUC now proposes to sell its Business Services assets, which include its telex facilities and operations, to the American Telephone and Telegraph Company (AT&T). Consequently, WUC requests authority to discontinue the provision of international telex service. Specifically, WUC requests discontinuance of the Commission's Section 214 authorizations[1] set forth in the instant application to the extent that those authorizations relate to WUC's provision of international telex service. WUC states that there will be no actual discontinuance of service to customers as AT&T will continue to provide the international telex service now provided by WUC upon WUC's discontinuance of that service.

DISCUSSION

3. We find that WUC has demonstrated that neither the present nor future public convenience and necessity will be adversely affected by its proposed discontinuance of the provision of international telex service. We note in this regard that there will be no actual discontinuance of service to WUC customers as AT&T will provide international telex service to those customers upon WUC's discontinuance of that service. In view of the fact that AT&T will continue the provision of international telex service to WUC's customers upon WUC's discontinuance of that service, we also find that grant of WUC's request for waiver of the 120 day notice of discontinuance of service provision of Section 63.10(c) of the Commission's Rules will not inconvenience WUC's customers. Therefore we shall grant WUC's requested waiver. We shall also grant WUC's requested waiver of the content of notice requirements of Section 63.71(b) of the Commission's Rules. We find that the language used by WUC in the notice it sent to its customers on July 3, 1990 sufficiently informed them of the proposed transfer of international telex service from WUC to AT&T. Therefore, we grant WUC's requested waiver.

4. We note that completion of the proposed sale of WUC's telex operations are also the subject of an application filed by AT&T, File Nos. W-P-C-6622 and I-T-C-90-163, seeking authority pursuant to Section 214 to acquire the WUC facilities used in the provision of telex service. Because of the relevance of our action on that AT&T application to the sale of WUC's telex operations and WUC's discontinuance of international telex service, we shall make the authorization we grant here subject to the ultimate disposition of AT&T's application.

ORDERING CLAUSES

5. In view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by WUC's discontinuance of the provision of international telex service.

6. Accordingly, IT IS ORDERED that application File No. I-T-D-90-011 of Western Union Corporation IS GRANTED and WUC is authorized to discontinue its provision of international telex service.

7. IT IS FURTHER ORDERED that WUC's request for waiver of the 120 day notice provision of Section 63.10(c) of the Commission's Rules IS GRANTED.

8. IT IS FURTHER ORDERED that WUC's request for waiver of the content of notice requirement of Section 63.71(b) of the Commission's Rules IS GRANTED.

9. IT IS FURTHER ORDERED that this authorization is subject to the Commission's action on AT&T's application File Nos. W-P-C-6622 and I-T-C-90-163.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.1115 of the Commissions's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] WUC's application lists the Commission Section 214 authorizations granted to WUC but does not list those Commission Section 214 authorizations originally granted to ITT World Communications Inc. (ITT Worldcom) which WUC acquired at

the time WUC acquired the telex operations of that company. WUC states that the records of the ITT Worldcom authorizations were lost and recreation of a list of those authorizations from the Commission's files would be extremely difficult. Therefore, WUC requests a waiver of the requirement to provide Section 214 file numbers for those former ITT Worldcom authorizations. We grant this WUC request. The authority to discontinue the provision of international telex service granted by this decision applies to the authority to provide telex service contained in both the Section 214 authorizations issued to WUC and those transferred to WUC from ITT Worldcom.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-263

In the Matter of

Amendment of Section 73.3525 of the
Commission's Rules Regarding
Settlement Agreements Among
Applicants for Construction Permits

REPORT AND ORDER

Adopted: December 13, 1990; Released: December 21, 1990

By the Commission:

1. As part of our continuing effort to eliminate abuse of Commission processes, we issued a *Notice of Proposed Rule Making* in this proceeding.[1] The *Notice* considered whether to limit the payments that can be made to settle cases involving competing applications for construction permits for new broadcast stations or modifications to facilities of existing stations.[2] We now decide to limit payments that may be received by applicants to legitimate and prudent out-of-pocket expenses up until the point that the trial phase of the hearing commences and prohibit any payments at all thereafter. This new rule will become effective on March 21, 1991, subject to Office of Management and Budget approval.

I. LIMITATIONS ON SETTLEMENT PAYMENTS

2. Some commenters[3] observe that the current policy permitting unlimited settlement payments in comparative new proceedings may create positive inducements to settle.[4] Indeed, in enacting the current version of the statute governing comparative new settlements (*i.e.*, 47 U.S.C. § 311(c)), Congress stated that settlement agreements "generally serve the public interest because they often avoid lengthy hearing appeals, thus expediting the start of the new broadcast service involved in the proceeding."[5] The record in this proceeding nonetheless persuades us that we should curtail payments made in comparative new settlements. We agree with NAB and others[6] that allowing unlimited settlement payments also creates an incentive to file frivolous applications. Deterrence of such sham applications was also clearly a Congressional objective when it enacted the current version of Section 311(c).[7] Thus, our decision to limit settlement payments not only will serve this important statutory goal, but also, as some suggest, should reduce or eliminate "profiteering" on Commission processes.[8] Such limitations will also further another purpose underlying Section 311(c), that of expediting hearings,[9] by reducing the number of non-*bona fide* applicants, and hence the complexity of proceedings.[10] Moreover, our decision to forbid payments once the trial stage of a case has begun will encourage earlier settlements, accelerating the resolution of proceedings and easing the burden both on litigants and on administrative resources. Finally, the disclosure requirements we are adopting will enable us to enforce compliance with payment limitations.[11]

3. The *Notice* solicited comment on ways to limit settlement payments. It proposed as one alternative limiting payments to expenses until a date certain -- such as a special settlement conference -- and reducing permissible payments thereafter.[12] In light of the hearing reforms adopted in General Docket No. 90-264, we do not here adopt the proposed settlement conference as the date on which recovery will be cut off.[13] We do, however, agree with the concept underlying such a demarcation point.[14]

4. We will permit applicants settling before the trial phase of the hearing commences to recover their legitimate and prudent expenses. This policy will encourage *bona fide* applicants to apply, as they will be able to recoup expenses up until the point at which they can make a realistic assessment of their probabilities of success. Once discovery is complete, the parties possess enough factual information to make a reasoned judgment on the probable outcome of their applications. Moreover, it is at this post-discovery point that the new voluntary settlement conference procedure provided for in General Docket No. 90-264 will become available to the parties. The settlement conference will provide a means for applicants to obtain an impartial assessment of their relative chances of prevailing over their competitors. In this way, an applicant's own assessment of its chances of success can be supplemented by the views of a third-party expert. Based on this information, applicants should be sufficiently apprised of the strengths and weaknesses of their cases so that an informed decision either to settle for expenses, or to continue with the comparative process, can be made. In the interest of expediting the delivery of new service to the public,[15] we wish to encourage settlement as soon as possible after the settlement conference is held, or after discovery is complete if no voluntary settlement conference is held. We believe that prohibiting payments made in exchange for dismissing applications will accomplish this result. The start of the trial phase of the hearing is a logical point for such a prohibition to attach.[16] This is a date certain of which all the parties have notice.[17] At this stage the applicants begin to incur significant additional expenses in the litigation of a case. Settlement at this point would be particularly beneficial to the successful applicant. The winning party would not have to expend resources litigating against less meritorious contenders in hearing. Instead, it would be able to use those resources to offer service to the public from a new station. Finally, commencement of the trial is a point at which parties traditionally attempt to settle.[18] We thus will prohibit all payments to settling parties after the trial phase of the hearing commences, *i.e.*, as of the first day of the trial phase of the hearing.

5. The *Notice* also specifically suggested that we permit reimbursement after the settlement conference, but only of a lesser amount (*e.g.*, 50 percent) of expenses.[19] Proponents of a graduated reduction in the amount of permissible recovery argue that this approach would encourage prompt settlements.[20] However, precluding settlement payments altogether after a point certain in the process will provide the greatest incentive toward early settlements and will therefore expedite the overall hearing process. Further consideration of this issue, moreover, suggested that any settlement plan turning on percentages

of expenses could be particularly prone to manipulation. To minimize this potential, we would be required to increase the expenditure of staff resources needed to review such agreements. It would be inconsistent with our intent to make our processes both efficient and fair to introduce a potential new source of delay and manipulation. Thus, on balance, we have determined that precluding settlement for payment after a specific point in the process would be preferable to allowing any form of settlement for expenses after such a cutoff. For the reasons explained above, we have found that the start of the trial phase of the hearing will provide a suitable point after which all settlements can be precluded.

6. The *Notice* also proposed, and some parties advocate, limiting settlement payments to out-of-pocket expenses throughout the comparative new process.[21] We find, however, that prohibiting all recovery after the trial phase starts will more effectively deter frivolous filings and encourage early settlements. Nevertheless, we do not adopt proposals to ban or severely limit payments at all stages in a comparative new case.[22] We fear that such a proposal might deter good faith applicants. Our new rule permits *bona fide* applicants to settle for expenses up until the point at which they can make an objective assessment of the probabilities of success. At such point -- the trial stage of the case -- the good faith applicant with a relatively weaker case is still able to recover its expenses. By encouraging settlement at this point, we lessen the likelihood that other parties with relatively stronger cases, as well as the resources of the agency, will be burdened by having to litigate a more complex case. Our new rule therefore will encourage both the filing of good faith applications and the continued prosecution of such *bona fide* applications as have an objective probability of succeeding at trial. Contrary to the fears of some parties,[23] we believe that our new rule will encourage *bona fide*, qualified, but less financially able applicants to continue to apply.

7. We also agree with those commenters fearing that allowing any recovery above expenses may encourage abuse and discourage less wealthy, yet *bona fide*, applicants that lack the wherewithal to finance large settlements but that nevertheless wish to own and operate a station.[24] Consequentiy, we do not adopt proposals either to allow uncapped payments for even a limited period,[25] or to permit recovery of a percentage above expenses, even if only until a date certain.[26]

8. Several parties urge alternative reforms that are beyond the scope of this docket. For example, NAACP and others advocate a limited exception for minorities to what they view as a general prohibition on third-party buyouts.[27] NAACP, among others, also advocates creation of a "Minority Media Ownership Trust" to be funded from a portion of the excess over expenses paid in settlements that would be used to support and train minority entrepreneurs.[28] BCFM and CBC advocate tightening the anti-trafficking rules[29] as an additional deterrent to abuse.[30] We express no opinion on the merits of these alternative proposals, which are not within the scope of this proceeding.

II. LEGAL AUTHORITY

9. Prior to 1982, Section 311(c) of the Communications Act authorized the Commission to approve comparative new settlements only if settlement payments did not exceed the legitimate and prudent expenses incurred by the applicant in prosecuting its application.[31] In 1982, Congress amended Section 311(c), striking the expense limitation.[32] It substituted the broader language that it had added to Section 311(d) (governing comparative renewals) a year earlier. In *Texas Television, Inc.*, the Commission determined (without any detailed explanation) that the Mass Media Bureau's interim policy of continuing to limit settlement payments, pending the outcome of a proceeding to determine whether to modify this restriction, conflicted with new Section 311(c).[33] The Commission thereafter (without notice and comment) modified Section 73.3525 of its Rules, 47 C.F.R. § 73.3525, to eliminate the out-of-pocket expense limitation.[34]

10. The *Notice* requested comment on the tentative conclusion that the Commission had the legal authority to impose settlement limitations under Section 311(c) of the Communications Act. Only one commenter doubts whether Section 311(c) permits such limitations. English contends that the Conference Report indicates that Congress' overriding statutory goal was to expedite settlements. English argues that reinstatement of settlement limits would require time-consuming Commission scrutiny, an administrative outcome that Congress explicitly rejected. English also argues that while the language of Sections 311(c) and 311(d) are the same, their purposes are different. It states that, in contrast to Section 311(c), Section 311(d) did not have as an objective encouraging settlements. Thus, according to English, even if restrictions on comparative renewal settlement payments are consistent with Section 311(d), this is irrelevant for purposes of interpreting Section 311(c).[35]

11. Contrary to our decision in *Texas Television* (which we hereby reverse), we agree with NAB and BCFM that Section 311(c) permits us to impose settlement limitations in the public interest.[36] We conclude, with NAB, that the deletion of the statutory language limiting settlement payments was intended to broaden, not narrow, Commission discretion in reviewing settlements. On its face, the statutory language in no way conflicts with our interpretation. Moreover, the language of the statute and the legislative history indicate that the statute permits approval of settlement agreements only if the Commission can determine that no party filed a "sham" application, *i.e.*, an application filed for the purpose of effectuating a settlement.[37] We may reasonably determine that the best way to ensure that applicants do not file such frivolous applications is to limit settlement payments as we have. Moreover, as observed above,[38] settlement payment limitations, by deterring speculative applications, can expedite the comparative new process, one goal of Section 311(c). By banning payments after the trial phase commences, we are contributing further to such expedition, by encouraging settlements early in the proceeding. Furthermore, the manner in which we implement our new rules ensures that Commission review of comparative new settlement agreements will be expeditious.[39] Finally, we find that Congress intended that both Section 311(c) and Section 311(d) deter sham applications in the comparative new and renewal contexts, respectively.[40] Thus, we believe it

correct to interpret both statutes in the same way, taking account of Congress' concerns for expediting the resolution of comparative new proceedings.

III. TREATMENT OF PENDING APPLICATIONS AND SETTLEMENT AGREEMENTS

12. We recently applied settlement limitations to all pending comparative renewal applications except those that had already been designated for hearing at the time the new rules became effective. We found it important to the public interest to implement those reforms as quickly and as broadly as possible. We excepted post-designation applicants because they, in contrast to applicants at the pre-hearing stage, may have relied on our previous policies in expending considerable resources in litigation.[41] In the comparative new arena it is also important to implement the reforms we adopt herein as soon as possible. For this reason we will not apply our new rules to new applicants only, as AWRT suggests.[42] At the same time, we believe that some accommodation must be made for existing applicants that have relied on our previous policies and could be prejudiced by the rule change.[43] Because some of our concerns in the comparative new context differ from those we have for comparative renewals, the form this accommodation takes will also differ.

13. Expeditious resolution of proceedings to facilitate the offering of new service to the public is a primary concern in comparative new cases. In the renewal context, by contrast, an incumbent generally will continue to provide service throughout the pendency of a proceeding. Thus, while applicants' reliance on existing rules in expending resources was a basis for not applying limitations to pending renewal proceedings already in hearing, the need to expedite service to the public through early settlements outweighs that reliance in the comparative new context. However, we must delay the effective date of the new rules beyond the normal 30 days required by the Administrative Procedure Act in order to obtain the approval of the Office of Management and Budget for the information collection requirements we adopt herein.[44] The effect of this delay is to provide a brief grace period for applicants before the new rules become effective, an alternative advocated by AWRT.[45] This brief postponement will also provide a reasonable protection of parties' reliance interests, while not interfering with our goal of encouraging early settlements among applicants in pending comparative new proceedings. Accordingly, as of the effective date of the new rules, March 21, 1991, the settlement payment limitations will apply to all applications, including those which are pending at that point. Any settlement agreements filed before this date will be considered under our former rules and policies.

IV. DISCLOSURE AND CERTIFICATION REQUIREMENTS

14. The *Notice* proposed to add to Section 73.3525 of our Rules a requirement that parties seeking approval of a settlement also submit (1) certifications that they have not received and will not receive any money or other consideration in excess of their legitimate and prudent expenses; (2) the exact nature and amount of any consideration paid or promised; (3) an itemized accounting of the expenses for which they seek reimbursement; and (4) the terms of any oral agreement relating to the dismissal or amendment of the application in question.[46] Upon review of the record, we adopt these requirements for applicants settling prior to the commencement of the trial phase of a comparative new proceeding. Any applicant seeking to dismiss or withdraw after the commencement of the trial phase must certify that it has received no consideration in exchange for such dismissal or withdrawal.

15. We decline to establish a bifurcated procedure, as HRO suggests,[47] of certification in the first instance by all applicants, followed by expense itemizations required of some fraction of applicants in the discretion of the administrative law judge and according to random selection. We believe that requiring a full disclosure of the consideration paid in each instance comports better with the overriding goal of this proceeding, to deter abuse of our processes. As noted above,[48] the time periods for oppositions to proposed settlements will remain the same as under our former rules. This factor, together with the approach we intend to follow in implementing these procedures articulated below, should ensure expeditious approval of settlements that are in the public interest. Finally, the certification and disclosure requirements we adopt herein are essentially the same as those adopted in the comparative renewal context.[49] This parallelism makes our procedures easier to understand and simpler to administer.

16. Two parties request that we clarify our policy on what expenses may be reimbursed, and in particular, on whether expenses incurred in negotiating a settlement are recoverable.[50] Because of the intervening change in the language of Section 311,[51] we do not adopt wholesale the administrative interpretation of reimbursable expenses used prior to the 1982 amendment to that statute. For example, the governing statute no longer constrains us to limit settlement payments to those expenses incurred in "preparing, filing and advocating the granting" of an application.[52] Indeed, the legislative history of the 1982 amendment evinces an intent to expedite proceedings via settlements. We agree with the FCBA that expenses legitimately and prudently incurred in preparing and negotiating a settlement are recoverable.[53]

17. We also believe that it will be beneficial to provide some additional guidance to the staff and interested parties in three areas. First, we clarify that itemizations of professional expenses may be submitted in statement form.[54] Second, as a general matter, principals of applicants are not entitled to reimbursement for services performed on behalf of the applicant.[55] Third, settling parties are required either to submit any ancillary agreements they have made, such as consulting agreements, or to certify that these do not exist.[56]

V. CONCLUSION

18. The policy and rule changes we adopt herein constitute another important step toward our goal of eliminating abuse of Commission processes, while preserving the opportunity for meaningful participation in the comparative hearing process, and of ensuring that new service to the public is expedited.

FINAL REGULATORY FLEXIBILITY ANALYSIS STATEMENT

I. Need and Purpose of this Action:

19. This action is taken as part of the Commission's continuing effort to eliminate abuse of its processes. It is additionally intended to expedite the comparative licensing process by reducing the volume of applications filed and by removing profit as a factor in settlement agreements, and to facilitate the provision of new service to the public.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

20. No comments were received relating to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

21. The Commission considered prohibiting all or nearly all settlement payments at any stage in a comparative new case. However, such a stringent restriction might deter good faith applicants.

22. A second option considered would have permitted recovery of expenses up to a point certain in the proceeding and after such point, recovery only of a portion (*e.g.*, 50 percent) of expenses. The Commission found that precluding all settlement payments after a point certain in the proceeding would provide the greatest incentive toward early settlement and would therefore expedite the overall hearing process.

23. A third option considered and rejected would have allowed the recovery of expenses throughout a comparative new proceeding. The Commission found that prohibiting all recovery after the trial phase starts will more effectively deter frivolous filings, encourage early settlements and conserve applicants' and Commission resources.

24. Finally, the Commission considered allowing settlement payments to reimburse some set figure above expenses. This option would not sufficiently deter sham applications and might prevent *bona fide* applicants with limited financial resources from filing.

25. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S C. Section 601 *et seq.* (1981)).

PAPERWORK REDUCTION ACT STATEMENT

26. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose a new or modified requirement or burden upon the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSE

27. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4, 303 and 311 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, and 311, Part 73 of the Commission Rules, 47 C.F.R. Part 73, IS AMENDED as set forth below, effective March 21, 1991, subject to Office of Management and Budget approval.

28. Further information on this proceeding may be obtained by contacting Gina Harrison, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PARTIES FILING COMMENTS

American Women in Radio and Television, Inc. (AWRT)

William O. Barry (Barry)

Black Citizens for a Fair Media, Chinese for Affirmative Action, District of Columbia Chapter of the National Association of Puerto Rican Women, Hispanic Bar Association of the District of Columbia, Media Access Project, Mexican American Legal Defense and Educational Fund, National Association for Better Broadcasting, National Council of La Raza, Philadelphia Lesbian and Gay Task Force, and Telecommunications Research and Action Center (BCFM)

English Communications Limited Partnership, Hampton Broadcasting Limited Partnership, Sundial Radio Broadcasters, a California Limited Partnership, Anchor Broadcasting Limited Partnership, Clarksville Broadcasting Limited Partnership, Ellwood Beach Broadcasting, Ltd., Fernandina Beach FM Limited Partnership, Fresno FM Limited Partnerhsip, Hamptons Communications Limited Partnership, Highland Communications, Ltd., Hillside Broadcasting Limited Partnership, Jupiter Broadcasting Limited Partnership, Port St. Lucie Broadcasting Limited Partnership, Radio Lompoc Limited Partnership, Salinas Broadcasting Limited Partnership, a California Limited Partnership, and Weyburn Broadcasting Limited Partnership (English)

Comments of the Federal Communications Bar Association (FCBA)

Henderson Broadcasting of Memphis, Inc. (Henderson)

Michael J. Hirrel (Hirrel)

Holme Roberts & Owen (HRO)

J.M. Broadcasting Ltd. (J.M.)

National Association for the Advancement of Colored People, the League of United Latin American Citizens, and the National Black Media Coalition (NAACP)

National Association of Broadcasters (NAB)

Elinor Lewis Stephens (Stephens)

Vince Lee Broadcasting Ltd. (Vince Lee)

PARTIES FILING REPLY COMMENTS

Black Citizens for a Fair Media, Chinese for Affirmative Action, D.C. Chapter of the National Conference of Puerto Rican Women, Hispanic Bar Association of the District of Columbia, Media Access Project, Mexican American Legal Defense and Educational Fund, National Association for Better Broadcasting, National Council of La Raza, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center (BCFM)

Congressional Black Caucus (CBC)

Howard University Small Business Center (Howard)

Michael J. Hirrel (Hirrel)

Kirk Johnson (Johnson)

Mid-West Family Group (Mid-West)

National Bar Association and the National Association of Black-Owned Broadcasters (NBA)

Keith L. Reising (Reising)

Smithwick & Belendiuk, P.C. (S&B)

APPENDIX B

Part 73 of the Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 303.

2. Section 73.3525 is amended by revising introductory paragraph (a), removing the final word "and" in paragraph (a)(1), substituting a semicolon for the period at the end of paragraph (a)(2), adding new paragraphs (a)(3), (a)(4), (a)(5), (a)(6), adding new paragraph (b), redesignating existing paragraphs (b) through (h) as paragraphs (c) through (i), and adding new paragraphs (j), (k), and (l) to read as follows:

§ 73.3525 Agreements for removing application conflicts.

(a) Except as provided in § 73.2523 regarding dismissal of applications in comparative renewal proceedings, whenever applicants for a construction permit for a broadcast station, prior to the commencement of the trial phase of the proceeding, enter into an agreement to procure the removal of a conflict among applications pending before the FCC by withdrawal or amendment of an application or by its dismissal pursuant to § 73.3568, all parties thereto shall, within 5 days after entering into the agreement, file with the FCC a joint request for approval of such agreement. The joint request shall be accompanied by a copy of the agreement, including any ancillary agreements, and an affidavit of each party to the agreement setting forth:

(1) The reasons why it is considered that such agreement is in the public interest;

(2) A statement that its application was not filed for the purpose of reaching or carrying out such agreement;

(3) A certification that neither the applicant nor its principals has received any money or other consideration in excess of the legitimate and prudent expenses of the applicant;

(4) The exact nature and amount of any consideration paid or promised;

(5) An itemized accounting of the expenses for which it seeks reimbursement; and

(6) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

(b) If a competing applicant seeks to dismiss or withdraw its application after commencement of the trial phase of the proceeding, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in exchange for dismissing or withdrawing its application;

(2) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(3) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining competing applicant must submit an affidavit setting forth:

(4) A certification that neither the remaining applicant nor its principals has paid or will pay any money or other consideration to the withdrawing applicant in exchange for the dismissal or withdrawal of the application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

* * * * *

(j) For purposes of this section, "legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner in preparing, filing, prosecuting, and settling its petition and for which reimbursement is being sought.

(k) For purposes of this section, "other consideration" consists of financial concessions, including, but not limited to, the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

(l) For purposes of this section, an "ancillary agreement" means any agreement relating to the dismissal of an application or settling of a proceeding, including any agreement on the part of an applicant or principal of an applicant to render consulting services to another party or principal of another party in the proceeding.

FOOTNOTES

[1] *Notice of Proposed Rule Making* in MM Docket No. 90-263, 5 FCC Rcd 3921 (1990) (*Notice*).

[2] Comparative hearings are held in the new licensing context when there are mutually exclusive (or competing) applications for new stations or conflicts between applications for new stations and applications by existing licensees to modify their facilities. In both proceedings (hereinafter "comparative new" proceedings), one (or more) of the applicants may pay the others either to dismiss or amend their applications to eliminate the mutual exclusivity.

[3] A list of parties filing comments and reply comments, together with the abbreviations for these parties, are contained in Appendix A. In this proceeding, 13 parties filed timely com-

ments and seven parties filed timely replies. Two parties, CBC and Howard, submitted replies one and two days late, respectively, together with requests to file out of time. We grant these requests and accept these two pleadings.

[4] FCBA Comments at 4; Henderson Comments at 3; J.M. Comments at 3; Vince Lee Comments at 3; Mid-West Reply at 6. The FCBA membership is divided on the question of whether to limit settlement payments. One faction believes that the current policy permitting unlimited settlement payments creates positive incentives to settle. The other faction, composed of the FCBA executive committee and much of its membership, however, believes that there is a need for settlement payment limitations. FCBA Comments at 2-3.

[5] H. R. Rep. No. 765, 97th Cong., 2nd Sess. 50 (1982) (Conference Report), *reprinted in* RR 2d (Finding Aids) 10:643. *See also* English Comments at 2-4.

[6] NAB Comments at 2. *See generally* BCFM Comments at 5-6; Hirrel Comments at 8-9; HRO Comments at 2-3.

[7] Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642.

[8] *See, e.g.*, NAB Comments at 2; HRO Comments at 2-3.

[9] Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642; *see also* 47 U.S.C. § 155(d).

[10] *See generally* NAB Comments at 3; BCFM Comments at 5-6; BCFM Reply at 4; NBA Reply at 3-4. An unlimited settlement payment policy may tend to expedite the later stages of a case, facilitating dismissals once applications have been filed. On the other hand, limiting settlement payments accelerates the process at the initial stages of a case by deterring frivolous filings before a proceeding has commenced and thus reducing the number of applications from the outset. In addition, our policy banning payments after the trial stage begins encourages applicants that do file, at a relatively early point in the case and based on the facts they have obtained through discovery, to make a realistic assessment of their likelihood of winning.

[11] *See infra* Section IV. Of course, any attempts to evade our rules, as the S&B Reply at 2 hypothesizes will occur, will be subject to sanctions, including designation of a permit or license for revocation and imposition of forfeitures and prosecution for misrepresentation of a material fact. 47 U.S.C. § § 312, 503; 18 U.S.C. § 1001. We would reject any settlement tainted by such conduct. A character issue would be designated against any dismissing party participating in such evasion, which issue would have to be resolved before any subsequent applications the party filed were granted. *Cf. West Jersey Broadcasting Co.*, 90 FCC 2d 363 (Rev. Bd. 1982) (denying license renewal for violation of 47 U.S.C. § 311 and accompanying misrepresentations).

[12] *Notice*, 5 FCC Rcd at 3923.

[13] The *Report and Order* in Gen. Docket No. 90-264, adopted today, establishes a procedure for voluntary settlement conferences before an impartial settlement judge. *Proposals To Reform the Commission's Comparative Hearing Process To Expedite the Resolution of Cases*, Gen. Docket No. 90-264, FCC Rcd, FCC 90-410, (adopted Dec. 13, 1990; released Dec. 21, 1990). Because of its voluntary nature, the settlement conference could not be used as a cut-off point for settlement payments in all cases.

[14] *See generally* HRO Comments at 4-5 & n.4; NAB Comments at 2-3 n.9 & at 4.

[15] Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:643.

[16] *See generally* Stephens Comments at 1 (arguing for reduction of permissible amount of recovery after a date certain in order to encourage early settlements).

[17] The date is set in an order issued by the Administrative Law Judge after the judge is assigned to the case.

[18] Several parties suggest other dates in the context of their specific proposals for permitting or denying settlement payments in varying degrees. *See, e.g.*, HRO Comments at 4-5 (proposing settlement "windows" with first cut-off prior to date motions to enlarge are due). For the reasons stated in the text, we believe that commencement of the trial phase of the case is the superior alternative.

[19] *Notice*, 5 FCC Rcd at 3923.

[20] *See, e.g.*, Stephens Comments at 1. *Cf.* AWRT Comments at 3 (alternatively advocating applying multiplier to expenses, to be reduced as the hearing advances, and arguing that such progressively decreasing payments could provide an incentive for early settlement).

[21] 5 FCC Rcd 3922-23. *See, e.g.*, BCFM Comments at 6-7; FCBA Comments at 2-3; Hirrel Reply at 3.

[22] NAB Comments at 2; Barry Comments at 1 (no expenses allowed until after the Initial Decision, at which time payment should be limited to the amount of filing fees). Our policy differs somewhat in the comparative renewal context. There, we completely prohibit settlement payments prior to an Initial Decision (and limit them to expenses thereafter) because an incumbent licensee with a greater stake in the outcome is particularly vulnerable to settlement demands early in the proceeding. By contrast, early stages of the comparative new process, where all applicants have made about the same level of investment, are less vulnerable to abuse. *Notice*, 5 FCC Rcd at 3922-23. On the other hand, we are particularly concerned with expediting resolution of comparative new cases, and therefore, with encouraging early settlements. Prohibiting settlement payments after the start of the trial phase effectively accomplishes this result. We also believe that it would undermine our goal of encouraging early settlements in the comparative new context to permit recovery, as we do for comparative renewals, after the Initial Decision.

[23] *See, e.g.*, BCFM Reply at 2; NBA Reply at 4-5.

[24] *See, e.g.*, BCFM Reply at 3-5; NBA Reply at 5-6.

[25] AWRT Comments at 2-3.

[26] FCBA Comments at 3 (part of FCBA constituency would support a cap equal to 125% of expenses, or alternatively, a 25% increase above expenses only until a date certain); AWRT Comments at 2-3 (alternatively proposes to limit expenses by use of a multiplier, which is reduced as the hearing advances).

[27] NAACP Comments at 7-8; Howard Reply at 3; CBC Reply at 5-6; Johnson Reply at 1. "Third-party buyout" refers to settlement payments made by a would-be permittee who is a non-party to a comparative proceeding in exchange for the withdrawal or dismissal of applications on the part of parties to the proceeding. BCFM opposes the NAACP proposal regarding third-party buyouts for several reasons, including a concern that it will create incentives for sham applications. BCFM Reply at 8-9.

[28] NAACP Comments at 9-16; Howard Reply at 3; CBC Reply at 4; Johnson Reply at 1. BCFM, while acknowledging the need for such a trust, believes that the funds for it should come from another source. BCFM Reply at 7.

[29] 47 C.F.R. § 73.3597.

[30] BCFM Comments at 7 n.2. On the other hand, some parties suggest that recent reform measures, such as imposition of the hearing fee and revisions to FCC Form 301, are more effective than limiting settlement payments. 47 C.F.R. § 1.1104; *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853 (1989), *recon. denied*,

FCC 90-396, FCC Rcd (adopted Nov. 20, 1990; released Dec. 5, 1990); Henderson Comments at 3-4; Vince Lee Comments at 3-4; J.M. Comments at 3-4. We still perceive a need for reforms in addition to those cited by these commenters, a need addressed by the settlement limitations we now impose.

[31] Communications Act Amendments, 1960, Pub. L. No. 86-752, 74 Stat. 889 (1960), *formerly codified at* 47 U.S.C. § 311 (c) (1960 Amendment), *amended by* Pub. L. No. 97-259, 96 Stat. 1087, 1095 (Sept. 3, 1982).

[32] This current version of the statute provides that "[t]he Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." 47 U.S.C. § 311(c)(3).

[33] *Texas Television, Inc.*, FCC 83-95, Mimeo 95003 (Mar. 9, 1983).

[34] *Order re Amendment of Part 73*, 53 RR 2d 823 (1983), *recon. denied*, FCC 83-503, Mimeo No. 33980 (released Nov. 2, 1983).

[35] English Comments at 2-5.

[36] NAB Comments at 2 n.6; BCFM Reply at 10-11.

[37] 47 U.S.C. § 311 (c)(3)(B); Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642.

[38] *See supra* paras. 2-6 and note 10.

[39] *See infra* Section IV. We observe that the responsive pleading cycle applied to requests for settlement approval under our new rules is the same as under our former rules. 47 C.F.R. § 1.294.

[40] The Conference Report states:

> "Section 311(d) was intended to prevent the filing of frivolous applications calculated to harass an incumbent or coerce payment of expenses to the competing applicant. This provision imposes identical standards and furthers the same goals in proceedings involving competing applications for new broadcast facilities."

Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642. The Conference Report, however, recognized the importance of expediting comparative new proceedings, where settlement means the initiation of new service to the public. Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:643. In the comparative renewal arena, by contrast, the public is already being served by an incumbent during the hearing.

[41] *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780, 4788 (1989) (*Comparative Renewal Order*), *recon. granted in part on other grounds*, 5 FCC Rcd 3902 (1990), *further recon. pending.*

[42] AWRT Comments at 3-4.

[43] Thus, while we apply our new rules to all pending applications, whether designated for hearing or not (as suggested in Barry Comments at 1 and BCFM Reply at 9) we also make a modest allowance for hardships that this may impose on those that relied on our prior rules.

[44] *See* 5 U.S.C. § 553(d); 5 C.F.R. § 1320.14(c).

[45] AWRT Comments at 3-4.

[46] 5 FCC Rcd at 3923.

[47] HRO Comments at 6-7.

[48] *See supra* note 39.

[49] *Comparative Renewal Order*, 4 FCC Rcd at 4787-88.

[50] FCBA Comments at 4-5; BCFM Reply at 3 n.1.

[51] The former statute described the allowable amount as that "determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application." 1960 Amendment, *supra* note 31. The current statute deletes this language and leaves us considerably more discretion in passing on settlement agreements.

[52] 1960 Amendment, *supra* note 31.

[53] FCBA Comments at 4-5. We thus do not intend to apply the interpretation used under the pre-1982 version of Section 311(c). *See,e.g., Keith L. Reising*, 4 FCC 2d 868 (Rev. Bd. 1966) (expenses incurred in settling a case not recoverable).

[54] It would not be necessary, however, to submit detailed descriptions of the number and job levels of persons providing professional services, or information as to hours and billings for professionals of various job levels. Nevertheless, a brief description of the nature of the specific activity and its connection with the comparative new proceeding should be provided. For example, the following descriptive phrases would be acceptable: "meeting with opposing counsel in connection with settlement," "research in connection with preparing motion to enlarge." *See generally Re-evaluation of Standards for Professionals Seeking Reimbursement Pursuant to Rule 73.3525*, 88 FCC 2d 1047 (1982).

[55] *Gray-Schwartz Broadcasting*, 47 RR 2d 1670, 1675 & n.14 (1980); *Communications Properties, Inc.*, 27 RR 2d 1600 (1973).

[56] *See generally Texas Television, Inc.*, 91 FCC 2d 1047 (Rev. Bd. 1982) (describing pre-1982 policy on consultancy agreements). *See also Venton Corporation*, 90 FCC 2d 307 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carriers'
January 1, 1991
Access Tariff Revisions

National Exchange
Carrier Association

Tariff F.C.C. No. 5 Transmittal No. 427

ORDER

Adopted: December 21, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

I. OVERVIEW

1. On November 1, 1990, the Nation's local exchange carriers (LECs) as well as the National Exchange Carrier Association (NECA) filed access tariff revisions[1] implementing the Commission's recent reduction in the authorized rate of return (ROR) from 12.0 percent to 11.25 percent.[2] These revisions would reduce access charges by approximately $372 million.

2. In the same filings, the Bell Operating Companies (BOCs) and GTOC [3] filed access charge revisions pursuant to the Commission's mandatory price cap rules, while United Telephone and Contel made voluntary price cap filings.[4] These filings both implement the Commission's reduction in the authorized rate of return and represent these LECs' first tariff filings under the Commission's recent *LEC Price Cap Order*.[5] The price cap indexes for carriers subject to price cap regulation include rate reductions of approximately $342 million to reflect the Commission's reduction in the authorized rate of return.

3. In addition to its tariff implementing the rate of return represcription,[6] NECA filed three other transmittals proposing various increases.[7]

4. On November 16, 1990, eight parties[8] filed petitions against one or more of the proposed tariff revisions implementing the rate of return represcription and price cap regulation. Both AT&T and MCI filed additional petitions against NECA's USF tariff revisions.[9] Both the LECs whose tariff revisions were challenged and NECA filed replies to these petitions.[10]

5. Following submission of these tariff revisions, several carriers either filed errata to correct their November 1 filings or requested special permission to correct those November 1 filings.[11] To achieve uniformity and coordination in the correction of these filings, the Bureau issued a Public Notice on November 28, 1990, specifying the forms and procedures to be utilized to make such corrections to the materials filed on November 1.[12] Generally, the Bureau directed the LECs to submit requests for special permission to file errata materials subject to the same January 1 effective date as the original materials.

6. The November 1 access filings are primarily designed to reduce rates to retarget the carriers' rates of return from 12 percent to 11.25 percent. Additionally, for carriers subject to price cap regulation, the filings endeavor to show the correct computation of the price cap indexes. With respect to the price cap tariffs, many petitioners raise index calculation issues. Our review indicates that most indexes and the rate levels filed, including rates for high capacity DS1 and DS3 services, comply with cap and band requirements. In some cases, we require carriers to file revisions to the tariffs on December 28, 1990. A separate Order To Show Cause addresses the issues presented by the Nevada Bell Special Access tariff.[13]

7. In general, we conclude that the filings show the carriers' rates of return have been properly retargeted to 11.25 percent. Price cap index values are, for the most part, computed accurately. Variations in rates, including rates for high capacity services, appear to be within the applicable bands. The revisions required by this Order must be filed on December 28, 1990, so that the tariffs may become effective on January 1, 1991.

II. DISCUSSION OF ISSUES

A. Services Excluded From Price Cap Regulation

1. Pleadings

8. Ad Hoc asserts that Bell Atlantic improperly fails to adjust rates for services excluded from the price cap system to reflect the reduction in the prescribed rate of return.[14] Ad Hoc states that the Commission directed LECs to effect an across-the-board rate reduction since the effect of the rate of return represcription is to reduce the return component of existing rates. The resultant rate reductions, Ad Hoc states, should be approximately equal (on a percentage basis). Ad Hoc Petition at 8. Specifically, Ad Hoc claims that Bell Atlantic fails to reduce the rate elements for the Switched Access Service Public Data Network, which it excluded from price cap regulation, and that those rates therefore remain targeted to earn a 12 percent return. *Id.* at 9. Ad Hoc therefore urges that Bell Atlantic (and any other price cap LECs which have not reduced rates for services not included in the price cap system) should be directed to revise those rates. *Id.* Ad Hoc also contends that the required rate of return represcription should apply to new services not yet subject to price cap regulation. *Id.*

9. While Bell Atlantic does not address this issue in its reply, NYNEX asserts that Ad Hoc is incorrect in arguing that the LECs must apply the rate of return represcription exogenous changes to new services. Citing the *TRP Order*, NYNEX says LECs must apply the rate of return represcription changes to the Price Cap Index (PCI) and then employ those changes to adjust their rates in accordance with the Commission's Rules. Since new services are temporarily held outside of price cap regulation, LECs were, in the view of NYNEX, correct in not adjusting rates for new services to reflect exogenous adjustments. NYNEX Reply at Appendix G, p. 1-2.

2. Discussion

10. As it acknowledges in its reply, NYNEX has not lowered its rates for new services to reflect the change in the authorized rate of return. *See* NYNEX Reply at Appendix G, p.2. However, we note that it has adjusted its PCI for the full effect of the rate of return represcription, including the effect associated with the rate base for the new services. Accordingly, overall rates in the relevant baskets are currently set to earn 11.25 percent and are consistent with the Commission's price cap rules. We have examined Bell Atlantic's rate reductions as well. Bell Atlantic also flowed through the full amount of the reduction arising from the lower rate of return. In the process of flowing through the required amount to specific rates, we find that the relatively minor variations that occurred from a strict across-the-board reduction in all rates are not inconsistent with applicable Commission Rules.

11. We note that for NYNEX and Bell Atlantic as well as other LECs, the services excluded from price cap regulation -- such as new services and services provided on an individual case basis (ICBs) -- represent a relatively small part of the total access services offered. Accordingly, in view of the fact that these LECs have fully flowed through to their access services the represcription related revenue requirement reduction, we deny Ad Hoc's petition on this issue.

B. Reduced State Tax Expense Following Represcription

1. Pleadings

12. Ad Hoc charges that the BOCs, GTOC, Contel, and United improperly failed to flow through to ratepayers the benefit of the reduced state tax expenses that will likely result from the represcribed earnings ceiling. Ad Hoc declares that LECs were required to flow through to ratepayers the full benefit of the reduction in the authorized rate of return which includes the revenue effect associated with the reduction in income tax expense that will result from the lower earnings ceiling. Ad Hoc Petition at 3. *See also* Sprint Petition at 3; MCI Petition at 9-10. Ad Hoc states that some LECs that elected not to participate in price cap regulation, such as Cincinnati Bell, include the full amount of the flow-through in their reductions, but that other carriers do not include the associated tax effect in their calculations. The result, Ad Hoc charges, is a targeted return of 11.53 percent rather than the required 11.25 percent, a rate-savings loss of approximately $130 million. Ad Hoc Petition at 3.

13. MCI similarly contends that LECs were to use the forecasted July 1, 1990 through June 30, 1991 rate as a basis for computing the dollar amount of the effect of the rate of return represcription and revise the earnings impact to include Federal, state, and local income tax effects. MCI Petition at 9-10. MCI alleges its own calculations demonstrate that Ameritech, Bell Atlantic, NET, GTOC, and United each used incorrect tax rates in calculating the impact of state and local taxes. MCI also claims that NECA, in Transmittal 424, used only a Federal tax adjustment factor and did not include any reductions for state and local tax effects. *Id.* at 10.

14. Basing its estimates on a Federal corporate income tax rate of 34 percent, Sprint claims that the tax adjustment factors of Cincinnati Bell, NYT, and Southwestern Bell are understated, resulting in exogenous cost decreases which are too low and PCI values which are too high. Sprint Petition at 3-4. For example, Sprint asserts that Cincinnati Bell's tax factor does not include Ohio's corporate state income tax or its tax on corporate net worth. *Id.* Sprint further contends that Southwestern Bell used two different tax adjustment factors that result in inconsistent reports and that Southwestern Bell shows inconsistent amounts as exogenous costs in two tables, Figures 2A-1 and amounts shown for EXG-1. *Id.* at 5.

15. Ameritech claims Ad Hoc incorrectly infers that the revenue effect shown on its TRP Forms refers solely to the return on investment and does not include the full tax impact of the rate of return represcription. Ameritech Reply at 5. Ameritech says the amount shown on the revenue effects line of those forms refers to the effect on revenues, including recomputed taxes from the change in the rate of return. Ameritech notes that it calculated that change in return due to the represcription, applied the applicable tax adjustment factor, and listed that amount in the revenue effects line. *Id.* at 5. Ameritech contends that under Ad Hoc's method the tax effect of the change in the rate of return would be counted twice. *Id.* NYNEX makes similar arguments in response to Ad Hoc's challenge to the NYNEX TRP Form EXG-1. NYNEX Reply at 4. Nevada Bell and Pacific Bell make a similar reply to Ad Hoc's contentions. Nevada Bell Reply at 5; Pacific Bell Reply at 4-5.

16. Ameritech disputes MCI's contentions that it failed to use the correct state and local tax rates and that it did not use the state gross receipts tax factor in all states where it applied. Ameritech Reply at 6. Citing relevant sections of the applicable state tax codes, Ameritech supports the tax rate calculations it made in its filings. *Id.* at 6-8. Similarly, Ameritech documents its application of a state gross receipts tax factor whenever such a factor was required. *Id.* at 6. Southwestern Bell claims that Ad Hoc incorrectly adds $12.495 million in additional "tax effect" to Southwestern Bell's established revenue effect, thereby improperly raising the total "revenue effect" of the required change in the ROR prescription to $47.602 million. Southwestern Bell reviews its calculations of the impact of the required change and asserts that its earlier calculations remain correct. Southwestern Bell Reply at 4-5.

17. NYNEX claims that Sprint ignores the fact that NYT recovers the bulk of the state gross receipts taxes through a separate Gross Income Tax Surcharge which is not subject to the price cap formula. To the extent that state gross receipts taxes are embedded in NYT's rates, NYNEX asserts that NYT has properly revised its exogenous cost factor to account for the rate of return represcription to include the effect of those taxes. NYNEX Reply at 4. NYNEX argues that MCI's attempt to show an understatement of NET's tax-related revisions in connection with the represcription is replete with errors. NYNEX seeks to demonstrate that its calculations are generally correct and complete. NYNEX acknowledges one error correction of which would increase the exogenous factor by only $62,000 and would therefore have only a *de minimis* effect on NET's rates. *Id.* at 4 n.9.

18. Bell Atlantic contests MCI's claims that it did not reduce the state and local components of its revenue requirement sufficiently and, as a result, overstated its revenue requirement. Bell Atlantic finds several errors in MCI's analysis, corrects those errors in its reply, and continues to assert that it has included appropriate rev-

enue requirement reductions in light of the savings in tax expense to be experienced at the reduced rate of return. Bell Atlantic Reply at Appendix A, Item 3, pp. 1-3. Bell Atlantic suggests that Ad Hoc erroneously assumes that the "revenue effects" amounts on Form EXG-1 consist solely of the revenue reduction to be experienced due to the change in required rate of return and do not include any revenue requirement reductions for taxes. Bell Atlantic shows that "revenue effects" amounts include both items. *Id.* at Appendix A, Item 3, pp. 1-4.

19. BellSouth seeks to demonstrate that its calculations are correct, charging that Ad Hoc misreads the TRP forms accompanying BellSouth's price cap filing and incorrectly assumes that the tax expense reduction associated with reduced earnings was not flowed through to ratepayers. BellSouth Reply at 5-6. US West contends that Ad Hoc incorrectly argues that certain tax effects are not included in US West's calculations. US West Reply at 5-6. US West illustrates that its transmittal includes the reduction in Federal, state, and local income taxes in the revenue effect associated with retargeting rates to comply with the rate of return represcription. *Id.* Southwestern Bell explains that the exogenous cost amounts shown on the EXG-1 Form do not come from Figure 2A-1 and that Sprint is not correct in using data listed on the EXG-1 Form to calculate Southwestern Bell's tax adjustment factor. Southwestern Bell explains how it calculated the Common Line (CL) basket tax adjustment factor appearing on the EXG-1 Form and asserts that such calculations are correct. Southwestern Bell Reply at 2-3.

20. GTOC notes that MCI's tax calculations were based on correct methodologies but contain certain erroneous state income tax rates. GTOC Reply at 3. GTOC claims that it accurately included all Federal, state, and local income tax effects due to the rate of return represcription. *Id.* Contel disputes Ad Hoc's contentions and asserts that its cost support clearly shows the correct derivation of the tax effect, rate of return reduction impact, and the total revenue effect. Contel Reply at 3. United asserts with regard to the United Telephone Company of Ohio (UTO), that MCI misstated UTO's tax calculation, applied a non-existent Ohio state tax rate, and made other errors in its petition on this point. Accordingly, United urges rejection of MCI's arguments as incorrect and unsupported. United Reply at 2-3. Also, United claims that Ad Hoc did not support its claim that United has failed to flow through properly the tax effects of the change in the rate of return prescription. *Id.* at 3.

21. NECA rejects MCI's claim that it understated the reduction resulting from the Commission's ROR represcription to reflect a reduced Federal tax adjustment factor. NECA claims that MCI failed to incorporate certain changes in fixed charges and therefore overstated the required reduction in Federal income tax expense. NECA Reply at 2-3. Also, in response to MCI's claim that it ignored state and local taxes in calculating revised revenue requirement, NECA acknowledges that it did not make an estimated allowance for such taxes but argues that such an estimate would be highly theoretical and would not produce a measurable impact on rates. NECA finds MCI's assumed tax rate of 5 percent to be arbitrary and its calculated understatement to be excessive. *Id.* at 3-5. On the basis of available information, NECA estimates such taxes would result in a decrease of $546,000, which represents only 0.04 percent of NECA's Carrier Common Line (CCL) and Traffic Sensitive (TS) pool revenue requirement of $1.4 billion. *Id.* at 4-5.

2. Discussion

22. In general, the RBOCs, GTOC, Contel, United, and Cincinnati Bell are correct that they used the proper state tax rates. Cincinnati Bell does concede it made ade *minimis*. With regard to NECA's proposed tariff revisions in Transmittal 424, further change does not appear needed to account for Federal and other tax effects on the basis of the foregoing information.

C. Retroactive Tax Rate Changes

1. Pleadings

23. MCI notes that NYT's revenue requirement underlying its current rates incorporates a one-time retroactive recovery of $7.87 million in gross income and gross receipts tax changes. MCI states that, while recovering the impact of the retroactive rate change may be appropriate, NYT's inclusion of that amount in the revenue requirement inflates the PCI and NYT's rates, which could lead to ongoing overcharges to the ratepayer. MCI Petition at 10. MCI requests therefore that the Commission require an exogenous change in NYT's PCI calculation to remove the effect of the retroactive tax expense. *Id.*

24. NYNEX argues that MCI is incorrect regarding the appropriate timing to reflect rate changes resulting from these tax changes. NYNEX contends that an exogenous adjustment should be included in NYT's April 1, 1991 price cap filing to remove the tax expense beginning July 1, 1991. NYNEX Reply at 5.

2. Discussion

25. We agree with NYNEX that the tax expense should be removed in NYT's July 1, 1991 rates. NYT is currently including recovery of approximately $8 million for gross receipts tax due for January 1, 1990 through June 30, 1990, and payable after July 1, 1990. This expense should be removed from NYT's PCI, but that adjustment should not occur until July 1, 1991.

D. High Capacity Services

1. Allegations That High Capacity Rates Are Excessive

a. *Pleadings*

(1) Petitions

26. MCI contends that Ameritech and Bell Atlantic have inappropriately excluded certain High Capacity services from the rate of return represcription. MCI Petition at 6. MCI acknowledges in a footnote that Ameritech's rate reductions were first filed in an August 1990 transmittal.[15] MCI asserts that Ameritech did not apply the rate of return rate adjustment factor (RAF) to its OPTINET DS1 Local Distribution Channels, Channel Mileage, or Optional Features, and did not adjust the RAF for the exclusion of those services. *Id.* MCI charges

that Bell Atlantic arbitrarily targeted the represcription effects to DS1 services while adjusting all other recurring Special Access services, excluding DS3 service, back to the July 1, 1990 rates. MCI declares that if Bell Atlantic had applied the Special Access exogenous changes equally to all services, a decrease of $346,000 in DS3 revenues would have resulted.[16]

27. Similarly, Ad Hoc submits that Bell Atlantic and Ameritech improperly failed to effect represcription-based reductions in rates for those services whose rates had been reduced subsequent to July 1. Ad Hoc Petition at 10.

(2) Replies

28. Bell Atlantic rejects claims of Ad Hoc and MCI that it should have further reduced its DS3 rates in order to pass through to DS3 customers the full benefits of the reduction in the authorized rate of return. For several reasons, Bell Atlantic contends that the Bureau should dismiss petitions urging further reductions in the rates for its DS3 services. First, Bell Atlantic notes that the Commission has not mandated *pro rata* allocation of the represcription revenue requirement reduction; second, Bell Atlantic says further reductions would place DS3 rates below the applicable band limit; third, Bell Atlantic asserts that Ad Hoc and MCI have made several incorrect assumptions regarding its rate of return targets for Special Access services. Bell Atlantic Reply at Appendix A, Item 7, p. 3.

29. Since DS1 rate reductions have already become effective, Ameritech says MFS's claim that Ameritech's reductions should be limited to ROR reductions is now moot. Ameritech Reply at 15.

b. ***Discussion***

30. We find that MCI and Ad Hoc present no basis for requiring further reductions in Bell Atlantic's rates to implement the represcribed ROR. Our review indicates that Bell Atlantic has made the full reduction in July 1, 1990 Special Access category rates contemplated in the *TRP Order*. We did not require that Bell Atlantic or other carriers make additional rate reductions if they elected to make intermediate rate reductions, but simply waived cost support requirements for recalculating the lower band Service Band Index (SBI). *See TRP Order* at para. 11.

31. We also find that MCI and Ad Hoc present no basis for requiring further reductions in Ameritech's rates to implement the represcribed ROR. Our review indicates that Ameritech has made the full reduction in July 1, 1990 Special Access category rates contemplated in the *TRP Order*. Also, on November 23, 1990, the Bureau released an Order reflecting our finding that Ameritech's reductions for this service were not so patently unlawful as to require rejection and that an investigation was not necessary at this time.[17]

32. Pacific Bell filed a reduction in its DS3 rates prior to November 1, 1990 and lowered those rates no further in this filing. On December 21, 1990, the Bureau released an Order which declined to find Pacific Bell's reduction of DS3 and DS3x3 rates to be unlawful, or otherwise to require investigation.[18] The filing also introduced Pacific's new DS3x12 service. We conclude that further reductions are not required for the same reasons such reductions are not required for Bell Atlantic or Ameritech. Nevada Bell reduced only its recurring charges, not its non-recurring charges. As rate of return represcription reductions have been fully allocated to Nevada Bell's access services, we conclude that further reductions are not required.

33. We note that BellSouth lowered its Information rates less than the other rates in the TS switched basket. BellSouth explains that Information has less investment associated with, and is thus less affected by, the rate of return represcription. As represcription reductions have been fully allocated to BellSouth's access services, we conclude that further reductions are not required.

2. Allegations That High Capacity Rates Are Too Low

a. ***Pleadings***

(1) Petitions

34. Ad Hoc alleges that Ameritech, Bell Atlantic, BellSouth, and Nevada Bell have strategically manipulated the flow-through of the effects of the reduction in the authorized rate of return. Ad Hoc charges that, despite instructions to LECs in the *LEC Price Cap Order* to file service rates that, on a percentage basis, are approximately equal, these carriers selectively reduced certain rates.[19] Ad Hoc notes that Ameritech and Nevada Bell's PCIs differ from their SBIs in Special Access, and also presents BellSouth's PCI and SBIs in the Switched Access Basket to illustrate selective rate reductions. *Id.*

35. Ad Hoc also asserts that Bell Atlantic effected disproportionate reductions in the rates for DS3 and DS1 services. As evidence, Ad Hoc notes that while Bell Atlantic's PCI and Actual Price Index (API) for the Special Access Basket is 98.14, the only SBI not set at 100 is found in the High Capacity DDS category. That SBI is set instead at 95.80. Ad Hoc finds similar disparities in the Digital Services category. Ad Hoc notes that DS1 and DS3 rates are set at 95.0 and 92.3, respectively. Ad Hoc Petition at 7-8.

36. MFS expresses concern that Bell Atlantic's tariff revisions involve below-service band rate changes. MFS claims that the cumulative effect of Bell Atlantic's DS3 rate reductions exceeds the service subindex established by the Commission but is not accompanied by the required support material. MFS Petition at 6. Further, MFS asserts that the reasonableness of the proposed reductions has not been determined since Commission review is not completed. *Id.* MFS concludes that the reduction cannot provide the basis to reduce the SBI to a level below that prescribed by the Commission. *Id.* at 7.

37. Both Eastern and ICC filed petitions charging that the rate reductions in Bell Atlantic's Transmittal 394 (its January 1, 1991, access filing) merely perpetuate unlawful rates first filed in Bell Atlantic's earlier Transmittal 389. Eastern Petition at 2; ICC Petition at 6. Both claim that Bell Atlantic's rate decreases for Special Access High Capacity DS3, DS3C, and DS3-to-DS1 multiplexing service do not comply with price cap rules. Eastern Petition at 3; ICC Petition at 6. Eastern and ICC also claim the rate reductions violate price cap rules which limit LECs' pricing flexibility for DS3 services to an annual change of 5 percent relative to the percentage change in the PCI for the Special Access services basket. Eastern Petition at 3; ICC Petition at 6. ICC also argues that Bell Atlantic's DDS and DS1 rate reductions are contrary to the instructions to LECs in the *TRP Order* that no rate modifications would be permitted other than to retarget rates to an

11.25 percent rate of return. ICC Petition at 5. ICC further states that Bell Atlantic's DS3 subindex of 92.73 warrants correction by the Commission to reflect any rate reductions required as a result of Transmittals 389 and 394. *Id.* at 3.

(2) Replies

38. In response to claims that it made disproportionate rate reductions for its DS3 service, Bell Atlantic contends that such reductions are within applicable guidelines and are not unlawful under the *LEC Price Cap Order* or applicable rules. Bell Atlantic Reply at Appendix A, Item 6, pp. 1-2. While Bell Atlantic acknowledges that its DS3 Service Band Sub-Index falls slightly under the range specified by the Rules, Bell Atlantic contends that the relevant rate changes are nonetheless permitted under the transitional procedures adopted by the Commission. *Id.* at Appendix A, Item 6, p. 2 n.*. *See also id.*, Appendix A, Item 7, p. 2.

39. As the *LEC Price Cap Order* and the *TRP Order* each contemplated rate reductions during the transition period, Bell Atlantic rejects MFS's contention that its various DS3 rate reductions violate the Commission's price cap plan. *Id.* In response to ICC's claim that it has not adequately reduced its DS3 sub-index, Bell Atlantic explains that limited demand, the recent offering of the service, and other factors prevented this sub-index from declining more in light of the pending rate reductions. Thus, Bell Atlantic contends that its calculations are in compliance with the Commission's Rules. *Id.* at Appendix A, Item 7, pp. 1-2.

40. Ameritech denies Ad Hoc's claim that it "strategically manipulated" the flow-through of the ROR reduction. Ameritech notes that its SBIs are not equal because of its earlier reductions in DS1 service rates. Ameritech Reply at 15. Ameritech contends that it applied the ROR reduction to each Special Access service in a consistent manner, thus reducing rates uniformly across all services, but that in the case of DS1 rates no additional reduction was taken beyond the reductions that became effective on November 25, 1990. Ameritech Reply at 14 n.22. Ameritech notes that the earlier DS1 rate reduction is greater than the reduction that a simple ROR flow-through would have produced. Ameritech says it could have further reduced its DS1 service rates to account fully for the ROR reduction but it did not do so because such a further reduction would have resulted in rates below the applicable SBI band. *Id.* at 14.

41. Nevada Bell states that Ad Hoc's petition ignores its Description and Justification (D&J), which shows the methods it used to calculate a uniform rate adjustment factor. It further declares that the methods used have been endorsed by the Commission. Accordingly, Nevada Bell argues that Ad Hoc's objections are groundless. Nevada Bell Reply at 6.

42. In response to MFS, Pacific Bell notes first that since the Commission is currently evaluating the changes to DS3 rates independently of this proceeding, MFS is in the wrong arena. Second, Pacific Bell notes that the Commission expressly permitted adjustments to the July 1, 1990 rates prior to the implementation of price cap regulation. Thus, Pacific Bell concludes that its adjustments are in accordance with the Commission's directions. Pacific Bell Reply at 4.

43. Responding to Ad Hoc's charges, BellSouth notes that its service category SBIs reflect exogenous changes due to a disallowance adjustment which, like the rate of return adjustment, was flowed through to each service category. BellSouth Reply at 7.

b. *Discussion*

44. In the *LEC Price Cap Order* the Commission expressly permitted adjustments to July 1, 1990 rates -- including reductions -- prior to the implementation of price cap regulation, if these rates are properly justified and supported.[20] Beginning January 1, 1991, these rates must also comply with the represcribed 11.25 percent rate of return and, for price cap companies, the price cap indexes and bands.

45. Bell Atlantic lowered its DS3 rates prior to November 1, 1990, and has lowered them no further in this filing.[21] Petitioners claim that the intermediate rate reductions, *i.e.*, reductions to rates for DS1 and DS3 services, are excessive. That issue is properly addressed to the merits of Bell Atlantic's earlier transmittal, not to the current filing which leaves these rates unchanged.

46. Ameritech reduced its DS1 rates on November 25, 1990, below the level required by the rate of return represcription. Ameritech is making no further reduction in DS1 rates here. Petitioners claim that Ameritech's intermediate rate reductions for certain High Capacity services were excessive. As is the case with Bell Atlantic, we believe that this issue is properly addressed to the merits of the earlier tariff transmittal, not to the current filing which leaves these rates unchanged.[22]

47. With regard to BellSouth and Nevada Bell, we do not find either their flow through of the represcription adjustments or their establishment of initial indexes under price cap regulation to be inconsistent with applicable Rules and Orders. Accordingly, we deny Ad Hoc's petition to the contrary.

E. Price Cap Base Period

1. Pleadings

48. Allnet asserts that certain carriers used incorrect base periods in calculating their revenue and indexes. Allnet argues that the *TRP Order* directs LECs to use forecasted July 1, 1990 through June 30, 1991 demand as the base period in the instant filing. Allnet alleges that Ameritech, Bell Atlantic, and Southwestern Bell -- and possibly others -- used historical demand from January 1, 1989 through December 30, 1989 as the base period for their tariff filings. Allnet Petition at 2. Allnet states that the error causes understated revenue projections. *Id.* at 3. Allnet further charges that by using historical demand versus forecasted demand, the carriers' APIs, SBIs, and PCIs are all incorrect since the relative weighted revenue used to develop each index is based on incorrect demand data. *Id.*

49. Ameritech responds that it correctly uses the forecasted demand period for its calculation of the effect of the represcription. Ameritech Reply at 9. Ameritech further asserts that it properly used base period demand, from January 1989 through December 1989, for the calculation of APIs and SBIs. *Id.* at 9. Bell Atlantic asserts that Allnet misunderstood the Commission's Rules and instructions regarding computation of indexes. Bell Atlantic Reply at Appendix A, Item 5, pp. 1-2. Noting that

forecasted demand is used only to compute the effect of the represcription, Bell Atlantic endeavors to show that it has correctly made all index computations. *Id.*; *see also* Southwestern Bell Reply at 10. Although not specifically named in Allnet's petition, NYNEX responds to Allnet's charges. NYNEX says Allnet is not correct in claiming that price cap LECs have erred in their SBI, API, and PCI calculations by relying upon historical demand (*i.e.*, base year 1989) rather than setting each of these indexes on the basis of forecasted demand for July 1990 to June 1991. Citing the *TRP Order*, NYNEX asserts that forecast period demand is used only to calculate the exogenous impact on the PCI of the rate of return represcription and the disallowance adjustments permitted under recent Commission Orders. NYNEX also construes the Commission's Rules to require use of historical demand data for all other purposes, including development of APIs and SBIs. NYNEX Reply at 6-7 & Appendix H.

2. Discussion

50. Allnet is incorrect. Data for July 1, 1990 through June 30, 1991 were to be used to compute the changes in the PCI for disallowance adjustments, for changes due to the rate of return represcription, and for changes in long term support due to the rate of return represcription. Data for calendar year 1989 were to be used to compute carriers' APIs and SBIs, as well as the DS1 and DS3 subindexes. Our review of the tariffs reveals that the carriers correctly employed the base periods required by the *TRP Order*.

51. We note that Contel incorrectly used forecasted demand data for July 1, 1990 through June 30, 1991 to compute its CCL rate cap. We direct Contel to recompute its CCL rate cap using historical 1989 demand.

F. PCI Changes To Reflect Disallowance Adjustments

1. Pleadings

52. Sprint claims that New England Telephone (NET) has overstated the disallowance adjustments associated with its January 1, 1991 access filing. Sprint charges that NET does not explain why the disallowance adjustments it filed on July 1, 1990 exceed the adjustments that are derived by computing the difference between the disallowances originally ordered in the *June 21 Order* and the revised disallowances ordered in the *October 3 Order*.[23] Sprint Petition at 8. Because the ratio of disallowance adjustments to revenues is used in the computation of total exogenous changes, Sprint argues that NET should be required either to provide an explanation for the difference in disallowance adjustments or to adjust its price cap index calculations. *Id.* at 9.

53. In its reply, NYNEX explains NET's calculations of the effects of the adjusted disallowances for both revenue requirements and demand. On the basis of its review of these calculations, NYNEX contends that NET correctly calculated the disallowance adjustments. NYNEX Reply at Appendix E, pp. 1-3.

2. Discussion

54. We have reviewed NET's calculations and conclude that Sprint is incorrect. NET computed the adjustments correctly.

G. Other Post-Employment Benefits (OPEB)

1. Pleadings

55. AT&T argues that Bell Atlantic, BellSouth, US West, Nevada Bell, and Pacific Bell should not be permitted to include in their rates approximately $86 million in increased costs caused by those LECs voluntarily changing their accounting treatment of Other Post-Employment Benefits (OPEB). AT&T Petition at 7. AT&T notes the OPEB costs, reflected in the July 1 rates, are embedded in the carriers' initial January 1, 1991 PCIs. AT&T states that the Commission did not permit AT&T to treat the conversion to accrual treatment of OPEB expenses as an exogenous change in calculating its PCIs because the Financial Accounting Standards Board's (FASB) proposal had not yet been adopted as a change in Generally Accepted Accounting Principles (GAAP) prior to AT&T's 1990 annual price cap filing. *Id.* at 8. AT&T further states that, although the *LEC Price Cap Order* denies exogenous treatment to LECs that convert to accrual treatment of OPEB expenses after the LECs commence price cap regulation but before FASB takes final action, the Order is silent with respect to those LECs that commenced accrual treatment of OPEB expenses on or before July 1, 1990 as part of the rates underlying their initial PCIs. *Id.* at 8-9. AT&T urges that the Order be clarified to require consistent treatment of exogenous changes that would conform to a uniform scheme for all price cap carriers. *Id.* at 9.

56. Ameritech, Bell Atlantic, and US West submit that no additional OPEB expenses were included as exogenous costs due to any change in their accounting methods. Ameritech Reply at 16-18; Bell Atlantic Reply at Appendix A, Item 1, p.1; US West Reply at 3. Nevada Bell and BellSouth assert that AT&T's objection to the LECs' OPEB accounting treatment is in reality a policy difference between AT&T and the Commission that is appropriately considered through a petition for reconsideration. Nevada Bell Reply at 2-4; BellSouth Reply at 3. Pacific Bell counters that AT&T is attempting to resurrect an issue already decided in the annual 1990 access tariff proceeding. Since the Commission has made clear that these tariff proceedings should not be a vehicle for re-examining the justification for earlier rates, these carriers urge the Commission to disregard AT&T's objections. *Eg.*, Pacific Bell Reply at 2-3.

2. Discussion

57. Prior to July 1, 1990, some LECs had, under rate of return regulation, included in their rates the cost of the change to an accrual method for accounting for OPEB expenses. Under rate of return regulation, this change occurred at the LECs' option, subject to Commission review of the issue of whether the accounting change was reasonable and prudent. The costs associated with accrual accounting for OPEB were embedded in July 1, 1990 rates for those carriers. In the *LEC Price Cap Order*, the Commission found July 1, 1990 rates to be a reasonable starting point from which to launch price cap regulation. The indirect inclusion of these OPEB expenses in these rates is accordingly consistent with the *LEC Price Cap Order*.

H. Computation of SBI Bands

1. Pleadings

58. Ad Hoc contends that all the price cap LECs have incorrectly calculated SBI upper and lower limit pricing bands applicable to the individual service categories within the various service baskets. Ad Hoc Petition at 11. Ad Hoc claims that the LECs have incorrectly calculated SBI upper and lower limit pricing bands since the LECs did not base those bands on service category SBIs. *Id.* at 12-13. Since the LECs' methodology allows for less pricing flexibility than that outlined by the Commission, Ad Hoc does not object so long as the LECs' method conforms to the intent of the Commission's Rules. *Id.* at 12.

59. Pacific Bell and the other LECs filing replies all contend that they calculated their upper and lower Service Band Indexes in accordance with the Commission's Rules and the *LEC Price Cap Order* and that Ad Hoc is incorrect in its calculation of those SBIs. *E.g.*, Pacific Bell Reply at 5. Contrary to Ad Hoc's method, which would set SBI band limits without any relationship to changes in the PCI and previous years' SBIs, Ameritech notes that it set its SBI band limits with reference to the PCI it calculated earlier. Ameritech Reply at 10-11.

60. Contel and others reply that they calculated SBI banding values consistently with the formula set forth in Appendix E, page 3, of the *LEC Price Cap Order*. Contel Reply at 5 (noting Ad Hoc's method does not comply with Section 61.47 of the Commission's Rules); US West Reply at 7; Southwestern Bell Reply at 11-12; NYNEX Reply at 6. Contel further alleges that Ad Hoc's method of calculation does not comply with Section 61.47(e) of the Commission's Rules, which limits pricing flexibility of a service category to an annual increase or decrease of 5 percent, relative to the percentage change in the PCI. Contel Reply at 4.

61. Similarly, Bell Atlantic rejects Ad Hoc's claim that it has incorrectly computed the upper and lower limits of its SBIs. Citing the procedures specified by the Commission's Rules and the *TRP Order*, Bell Atlantic asserts that it has correctly adjusted the upper and lower bands of the SBIs to correspond with the PCI range. Bell Atlantic Reply at Appendix A, Item 2, p. 1. BellSouth states that although it believes it has properly implemented the rules, it agrees with Ad Hoc that because AT&T and the LECs are subject to the same rule regarding the calculation of upper and lower SBI limits, that the same methodology must be employed. BellSouth Reply at 7-8. To the extent AT&T employs a different method, as Ad Hoc implies, BellSouth looks to the Commission for direction as to which method of SBI calculation LECs should use. *Id.* at 8.

2. Discussion

62. Contrary to the contentions of Ad Hoc, the carriers involved have correctly employed their July 1, 1990 rates adjusted for the change in their PCIs, plus or minus 5 percent, to compute their SBI limits.[24] Since the July 1, 1990 SBIs equal the July 1, 1990 PCIs, this is equivalent to computing the SBI limits as plus or minus 5 percent of the January 1, 1991 PCI. We note that the Commission followed a similar approach in setting SBIs for AT&T.[25] Accordingly, we find no reason to require revision of these LECs' SBIs on this matter.

I. Common Line PCI Adjustments To Reflect Reduced LTS

1. Pleadings

63. Sprint and MCI contend that Bell Atlantic and Southwestern Bell erred in their Common Line PCI adjustments. Sprint contends that the carriers failed to flow through the total amount of their reduced Long Term Support (LTS) obligations. Sprint Petition at 6. Sprint contends that these carriers adjusted their CL PCIs to reflect far lower amounts than would be expected, given their share of total LTS contributions. Sprint states that the understatement of savings accruing from the reduction in their LTS payments means that these LECs have not adjusted their PCIs or reduced their rates by an amount that correctly reflects their revised LTS payments. *Id.*

64. MCI complains that Bell Atlantic has twice counted its payments to NECA for Long Term and Transitional Support in its CL PCI calculations. MCI Petition at 5. Sprint contends that neither Bell Atlantic nor Southwestern Bell has explained the reasons for alleged discrepancies between its Tier 1 LTS adjustments and the corresponding exogenous cost adjustments. Sprint concludes that both carriers should be required to reduce their CL rates and their CL PCIs to reflect their full share of LTS payment reductions. Sprint Petition at 7.

65. Contrary to MCI's assertions of double counting, Bell Atlantic contends that it only includes these payments once in the calculation at issue. Bell Atlantic Reply at Appendix A, Item 4, p. 1. Also, Bell Atlantic rejects Sprint's contention that it used an incorrect amount of LTS in its filing. *Id.* at Appendix A, Item 4, p.2. Southwestern Bell also reviews its computations and asserts that it properly computed the impact of the change in its LTS obligations. Southwestern Bell Reply at 6-7.

2. Discussion

66. The carriers have computed the adjustments correctly. As Bell Atlantic and Southwestern Bell both note, their LTS amounts were raised after July 1, 1990, and the reduction in the pending filing is partially offset by that earlier increase.

J. Errors in Computing Common Line PCI for January 1, 1991

1. Pleadings

67. AT&T states that Southwestern Bell, GTOC, Ameritech, and BellSouth made errors that overstate their PCI for the CL basket. AT&T Petition at 2. AT&T asserts that the overstatements result in $7.6 million in overcharges to ratepayers, and that the erroneous calculations could continue for all subsequent PCIs through successive years. *Id.* AT&T states that Southwestern Bell excluded certain rate of return represcription exogenous costs from the PCI formula. AT&T asserts that, since Southwestern Bell included only the reduced CCL component but excluded the subscriber line charge component from its PCI calculation, Southwestern Bell's PCI appears overstated by an amount that could result in excess rates of approximately $3.9 million. *Id.* at 4. AT&T asserts that GTOC and BellSouth inappropriately included Transitional Support receipts as part of their revenue, causing inflated PCIs. AT&T charges that these revenues are inappropriate

for inclusion since the revenues are received by the LECs directly from the Transitional Support fund independently of the rates to be paid by access customers established under the price cap mechanism, and thus are not appropriate for inclusion in the "R" component of the price cap formula. *Id.* at 5. Finally, AT&T asserts that Ameritech's Common Line minutes of use rate appears overstated because Ameritech double counted the effects of certain rate increases in the July 1 - October 1, 1990 period. *Id.* at 5-6.

68. MCI argues that Bell Atlantic and Southwestern Bell miscalculated the PCI in their CL Baskets. MCI states that Bell Atlantic included its Long Term and Transitional Support payments to NECA twice in the denominator of its CL PCI calculation. MCI Petition at 2. MCI further charges that Southwestern Bell double counted the reduction in its End User Common Line (EUCL) revenues in determining the resultant PCI for the CL Basket and CCL rates. *Id.* MCI asserts that the revision Bell Atlantic filed to correct a similar error indicates that Bell Atlantic is double counting its Long Term and Transitional Support payments to NECA. *Id.* at 5. MCI states that the double counting causes inflation in the revenue term in the PCI formula, which ultimately causes higher CCL rates. *Id.*

69. Sprint says Southwestern Bell has not adjusted its PCI or reduced its rates enough to reflect the reduced amount of its LTS payments, and that rather than the current reduction of only $211,000, Southwestern Bell should make a further reduction of $281,000 to bring the total reduction to $492,000 and thereby fully account for the LTS reduction. Sprint Petition at 6-7.

70. While acknowledging that its CL_{MOU} factor was overstated, Ameritech attributes this to an error made in calculation of its SLC_{MOU} factor and not due to the use of any incorrect rates as AT&T asserts. As Ameritech corrected this error in a recent transmittal and as the dollar impact of the correction is the same as the impact of the errors asserted by AT&T, Ameritech argues that these circumstances render AT&T's claim moot. Ameritech Reply at 19. In response to Sprint, Southwestern Bell contends that its rates do reflect an LTS amount higher by $492,000 as compared with the LTS included in its present rates. However, Southwestern Bell asserts that this $492,000 amount is not the correct amount to be included in the calculation of its exogenous cost adjustment. Rather, Southwestern Bell supports with calculations its contention that its original reduction of $211,000 continues to be correct. Southwestern Bell Reply at 6-7.

71. In response to the objections of MCI and Sprint, Southwestern Bell asserts that it properly calculated its price cap CCL rates by proportionately reducing the amount of the overall reduction in the target rates or return (*i.e.*, by 75 basis points). Southwestern Bell notes that imposing the exogenous cost reductions associated with both the CCL and EUCL on CCL rates would result in a total reduction in Common Line annualized revenue of $20.8 million, $3.3 million more than is required by the represcription revenue requirement reduction. *Id.* at 8. Accordingly, Southwestern Bell concludes that its terminating premium CCL rate of $.0104 is correct. *Id.* at 8-9.

2. Discussion

72. *Southwestern Bell.* This company has excluded some of the CL effect of the rate of return represcription in computing its CL PCI. In its reply, Southwestern Bell states it did this so that it would reduce its CCL rates by the same amount it would have under rate of return regulation. The price cap rules require a greater reduction because there was a greater than proportional change in premium terminating minutes (22 percent versus about 6 percent for originating premium minutes) in 1990 and 1991 over 1989. Thus, a change in the premium terminating rate has a greater effect using the projected 1990 and 1991 demand, as would have been done under rate of return, than it does using 1989 demand, as under price caps. Southwestern Bell should include the entire CL effect of the rate of return represcription in its PCI. In fact, Southwestern Bell has filed an application for special permission to revise its rates to correct this calculation. We grant this application in this Order.

73. *BellSouth and GTOC.* Both LECs used a footnote on Chart EXG-1 of the TRP equating "Base Revenue" to "Revenue Requirement," as the basis for including the Transitional Support revenue requirement in the computation of the PCI. However, the text of the *TRP Order* instructs the companies to use rates times demand as the Base Revenue. *See TRP Order* at para. 10. Since Transitional Support is not changing in this filing, the only way to change the revenue received by the companies is to change their rates. Thus, these companies are directed to recompute using base rates times demand, rather than revenue requirement, to compute their PCIs.

74. *Bell Atlantic.* As did BellSouth and GTOC, Bell Atlantic used revenue requirement rather than rates times demand in computing its CL PCI. Bell Atlantic computed revenue requirement by adding the April 1, 1990 filed revenue requirement, Long Term Support, and disallowances. Bell Atlantic also made other errors. It added only the cost disallowances, leaving out the demand disallowances. It also computed the change to the PCI in one step instead of in two steps as instructed in the *TRP Order.* Bell Atlantic should recompute its PCI using rates times demand, and in two steps.

75. *Ameritech.* AT&T's objection to Ameritech's PCI is unfounded. Ameritech used its July 1, 1990 rates as the base, and properly included subscriber line charge revenue from Lifeline customers at the full end user rate, rather than at the rate the Lifeline end user pays. *See* 47 C.F.R. § 69.502.

76. *Nevada Bell and United.* We note Nevada Bell has incorrectly computed a PCI for CCL_{MOU} rather than using the formula required by our Rules.[26] United has computed its CCL_{MOU} using the rate of return method. We direct these carriers to compute their CCL_{MOU} caps as required in the Rules and adjust their CCL rates as necessary.

77. None of the carriers that erred in computing the PCI has attempted to justify rates as above cap filings. Each carrier attempted to file rates that do comply with the applicable cap. In these circumstances, affected carriers that filed above cap rates should be required to refile rates that do not exceed the applicable cap.

K. US West SPUR Designation

78. We note that US West has removed the Service Provided Upon Request (SPUR) designation for certain Private Line Transport Services (PLTS) in this filing. The SPUR designation was introduced in the tariff filing that was first filed when US West started to aggregate separate state rates into single company rates and later into regional rates. The "SPUR" designation was developed to indicate the availability of specific PLTS rate elements within a state and required the recalculation of the company rate to include the cost of adding a new state to the regional rate. US West states that under the price cap rules, rates will no longer need to be recalculated each time a service is introduced in a state.[27]

79. We find that this revision is a restructure of the existing tariff. Both the Commission's *LEC Price Cap Order* and the *TRP Order* contemplated that price cap LECs would be limited in their January 1, 1991 filings to the following changes: implementation of price caps and represcription of the rate of return. *LEC Price Cap Order* at paras. 245-50; *TRP Order* at paras. 1, 4-5. Accordingly, we have determined that US West should reinstate the earlier SPUR arrangements. Should US West desire to restructure its offerings, it may file a separate transmittal with appropriate support information.

L. NECA Transmittal No. 427

80. This transmittal would increase rates interexchange carriers (ICs) are required to pay to NECA to fund the Universal Service Fund (USF) by 30.5 percent and the Lifeline Assistance (LA) program by 51.4 percent. MCI filed a petition seeking rejection or an investigation of the increases and suspension of the portion of the USF increase not associated with a transition scheduled by Commission Rules[28] and the full increase in the LA rate. In its petition, AT&T requests investigation and suspension of the USF rate but does not oppose the LA rate.

81. With respect to the USF increase, MCI argues that the increase in USF revenue requirement not associated with the scheduled transition is too high and is calculated using flawed and erroneous data, citing instances of what it describes as "unusually large increases in loop costs unaccompanied by commensurate increases in the number of working loops." MCI USF Petition at 5. MCI also believes that NECA has failed to screen the loop cost data submitted to it by individual LECs to eliminate inconsistent and erroneous data. MCI calculates that if only the transitional portion of the USF rate is allowed, the rate would increase from $0.2367 to $0.2674 per pre-subscribed line per month rather than to $0.3090 as proposed by NECA. AT&T argues that the significant USF increase is inadequately explained and unjustified, but presents no specific claim that the rate was calculated incorrectly, except to claim that "a disporportionate share of the USF expense growth . . . is attributable to growth in corporate overhead expense." AT&T USF Petition at 3-4.

82. MCI also contends that the LA rate increase, which is based in part on a prior shortfall caused by increases in the states adding programs and the number of participants, is a reversal of historical trends. It contends NECA has not provided evidence to demonstrate the increase is justified.

83. NECA replies that both the USF and LA rates are fully supported and justified. According to NECA, MCI's analysis of USF data is misleading and inaccurate, failing to consider the effects of LEC conversions from average schedule to cost based settlements and mergers or acquisitions. It claims the growth in loop costs for USF companies is consistent with data from comparable non-USF companies and defends its data validation process as extensive and thorough. NECA USF Reply at i-ii and *passim*.

84. We conclude that MCI has not demonstrated that the LA increases warrant investigation.[29] We have not completed our analysis of the USF increases, but some increase appears to be justified. We accordingly permit the LA increase to become effective. We defer the USF portion of the transmittal until February 1, 1991, but NECA may refile a USF rate increase of $0.2696 to take effect January 1.

III. ORDERING CLAUSES

85. Accordingly, IT IS ORDERED that tariff revisions in compliance with this Order shall be filed on **December 28, 1990,** with a scheduled effective date of **January 1, 1991.**

86. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Contel Corporation, GTE Telephone Operating Companies, Nevada Bell, Southwestern Bell Telephone Companies, and United Telephone System Companies, SHALL REVISE rates reflecting recalculations for errors in their Common Line Price Cap Index computation, as indicated in paragraphs 51, 72-74, 76, *supra*.

87. IT IS FURTHER ORDERED that US West SHALL REINSTATE tariff provisions for its Service Provided Upon Request (SPUR) designation for certain Private Line Transport Services in its filing, as indicated in paragraphs 78 and 79, *supra*.

88. IT IS FURTHER ORDERED that the National Exchange Carrier Association, Inc., SHALL DEFER the effective date of the tariff revisions relating to the Universal Service Fund filed under Transmittal No. 427 from January 1, 1991 to February 1, 1991 pursuant to authority delegated to the Chief, Common Carrier Bureau, in Section 61.58(a)(2) of the Commission's Rules, 47 C.F.R. § 61.58(a)(2).

89. IT IS FURTHER ORDERED that the National Exchange Carrier Association, Inc., MAY FILE tariff revisions relating to the Universal Service Fund as specified in paragraph 84, *supra*.

90. IT IS FURTHER ORDERED that Bay Springs Telephone Company, Inc., Application Nos. 18 and 19; Centel Telephone Companies, Application No. 81; Nevada Bell, Application No. 50; Pacific Bell, Application No. 181; and Southwestern Bell, Application Nos. 242 and 245 ARE GRANTED. Tariff revisions reflecting grant of these applications should be filed on December 28, 1990 to become effective January 1, 1991.

91. IT IS FURTHER ORDERED that Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, ARE WAIVED for the purpose of compliance with this Order and Special Permission No. 90-1312 IS ASSIGNED.

92. IT IS FURTHER ORDERED that, to the extent a local exchange carrier has previously reduced rates or adjusted its calculations, either in response to the *Erratum Notice* or in any other previous filing, and to the extent those reductions or adjustments duplicate directions in

this Order, the local exchange carrier need not make further reductions or other adjustments. Any local exchange carrier covered by the provisions of this paragraph SHALL FILE notice to that effect with the Secretary of the Commission on December 28, 1990.

93. IT IS FURTHER ORDERED that the petitions to suspend and investigate or to reject the January 1, 1991 Access Tariff Filings, filed by Ad Hoc Telecommunications Users Committee, Allnet Communications Services, Inc., American Telephone and Telegraph Company, Eastern TeleLogic Corporation, Institutional Communications Company, Metropolitan Fiber Systems, Inc., and US Sprint Communications Company Limited Partnership, ARE GRANTED to the extent indicated herein but otherwise ARE DENIED.

94. IT IS FURTHER ORDERED that the petition to suspend and investigate the January 1, 1991 Access Tariff Filings, filed by MCI Telecommunications Corporation, except as it pertains to Nevada Bell, IS GRANTED to the extent indicated herein but otherwise IS DENIED. To the extent the petition of MCI Telecommunications Corporation pertains to Nevada Bell, consideration of the petition is deferred pending a review of Nevada Bell's response to the Bureau's Order To Show Cause noted herein.

95. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate NECA Transmittal No. 427 filed by MCI Telecommunications Corporation IS DENIED to the extent that it concerns the rate for Lifeline Assistance. To the extent the petition pertains to the Universal Service Fund rate, consideration of the petition is deferred pending further review.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Approximately 54 transmittals proposing tariff revisions were filed, of which 12 involved both price cap and represcription filings. The remainder of the transmittals were limited to represcription filings.

[2] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, Memorandum Opinion and Order, FCC 90-315, released Dec. 7, 1990 (*Represcription Order*); Commission Requirements for Cost Support Material To Be Filed with January 1, 1991 Access Tariff Revisions, DA 90-1499, released Oct. 24, 1990 (Com.Car.Bur.) (*TRP Order*).

[3] The full names and corresponding abbreviations of the petitioners and the parties filing replies are listed in the Appendix.

[4] Mandatory filings pursuant to Section 61.41(a)(2) of the Commission's Rules, 47 C.F.R. § 61.41(a)(2), were made by the following LECs: Ameritech, Trans. No. 485; Bell Atlantic, Trans. No. 394; BellSouth, Trans. No. 353; Southwestern Bell, Trans. No. 2038; US West, Trans. No. 126; Illinois Bell Telephone Company (Illinois Bell), Trans. No. 882; NET, Trans. No. 1099; NYT, Trans. No. 1093; Nevada Bell, Trans. No. 113; Pacific Bell, Trans. No. 1507; GTOC, Trans. No. 633. Voluntary filing pursuant to Section 61.41(a)(3) of the Commission's Rules, 47 C.F.R. § 61.41(a)(3), were made by the following carriers: Contel, Trans. No. 74; United, Trans. No. 268. As a result of their voluntary filings, United and Contel will become subject to mandatory price cap regulation as of the date their price cap tariff revisions become effective. *See* 47 C.F.R. § 61.41(d). Filings by these price cap LECs address the changes mandated by price cap regulation as well as the reduction in the authorized rate of return. In addition, several of the LECs listed in this footnote have filed errata to their original transmittals.

[5] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order), recon. pending*; Erratum, released Oct. 31, 1990 (*Erratum*).

[6] NECA, Revisions to Tariff F.C.C. No. 5, Transmittal No. 424.

[7] NECA, Revisions to Tariff F.C.C. No. 5, Transmittal No. 425, filed Nov. 1, 1990; Transmittal No. 426, filed Nov. 26, 1990; and Transmittal No. 427, also filed Nov. 26, 1990. NECA Transmittal Nos. 425 and 426 are being deferred in separate letters. We address some questions relating to NECA Transmittal No. 427 in this Order. *See* paras. 80-84, 88-89, and 95, *infra*.

[8] AT&T, Ad Hoc Telecommunications Users Committee, MCI, Sprint, Metropolitan Fiber Systems, Inc., Allnet, Eastern TeleLogic Corporation, and Institutional Communications Company.

[9] MCI Petition To Reject or To Suspend and Investigate NECA Tariff F.C.C. No. 5, Trans. No. 427 (MCI USF Petition); AT&T Petition To Suspend and Investigate NECA Tariff F.C.C. No. 5, Trans. No. 427 (AT&T USF Petition).

[10] *See* the Appendix for a list of the parties that filed replies. *See also* NECA Reply to Petitions to Reject or, in the Alternative, Suspend and Investigate NECA Transmittal No. 427 (NECA USF Reply).

[11] *TRP Order* at paras. 16-17.

[12] Procedures for Filing Errata to Support Information for Annual 1991 Access Tariffs, DA 90-1740, released Nov. 28, 1990 (Com.Car.Bur.) (*Erratum Notice*).

[13] Nevada Bell, Tariff F.C.C. No. 1, Transmittal No. 113, Order To Show Cause, CC Docket No. 90-1862, released Dec. 21, 1990 (Com.Car.Bur.).

[14] Ad Hoc Petition at 8, citing *LEC Price Cap Order* at para. 249.

[15] *See* MCI Petition at 6 n.8. On November 23, 1990 the Bureau released an Order denying petitions against the Ameritech tariff. *See* Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Transmittal No. 468, Order, DA 90-1712, released Nov. 23, 1990 (Com.Car.Bur.).

[16] MCI Petition at 7. On December 21, 1990 the Bureau released an Order denying petitions against the Bell Atlantic tariff. *See* Bell Atlantic Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 389, Order, DA 90-1859, released Dec. 21, 1990 (Com.Car.Bur.).

[17] *See* note 15, *supra*.

[18] *See* Pacific Bell, Tariff F.C.C. No. 128, Transmittal No. 1506, Order, DA 90-1857, released Dec. 21, 1990 (Com.Car.Bur.).

[19] Ad Hoc Petition at 7. *See also* MFS Petition at 3-5. Additionally, MFS asserts that during the transition to price cap regulation, Ameritech should not be permitted to lower rates beyond the specific reductions required by the Bureau's *TRP Order*. MFS Petition at 2-5.

[20] *See LEC Price Cap Order* at para. 245.

[21] Bell Atlantic Transmittal 389, which lowered DS3 rates, took effect on December 21, 1990. *See* note 16, *supra*.

[22] The earlier Ameritech transmittal has been permitted to take effect. *See* note 15, *supra*.

[23] *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-845, released June 21, 1990 (Com.Car.Bur.) (*June 21 Order*); Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-1303, released Oct. 3, 1990 (Com.Car.Bur.) (*October 3 Order*).

[24] Section 61.47(e) of the Commission's Rules provides that "each band shall limit pricing flexibility of the service category as reflected in the SBI to an annual increase or decrease of 5 percent, relative to the percentage change in the PCI for that basket . . . ."

[25] *See* Part 61.47 of the Commission's Rules, 47 C.F.R. § 61.47.

[26] Section 61.46(d) of the Commission's Rules, 47 C.F.R. § 61.46(d).

[27] *See* US West, D&J, Section 3.1, pp. 3-1 and 3-2. While other carriers have similar arrangements where regional rates are employed, none of those carriers eliminated those arrangements in this filing.

[28] *See* Section 36.641 of the Commission's Rules, 47 C.F.R. § 36.641.

[29] NECA has filed a correction to its Lifeline Assistance rate to reflect two changes. In New Jersey, the End User Common Line reduction and waiver portion of the Lifeline Assistance program, which was expected to take effect January 1, 1991, is now not expected to take effect before July 1, 1991. In Wisconsin, this program will be in effect in June, rather than in February as originally expected. NECA has therefore filed an amendment to Transmittal No. 427 to remove the revenue requirement associated with these two programs.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-643

In the Matter of

Amendment of Section 73.202(b), RM-7579
Table of Allotments,
FM Broadcast Stations.
(Columbia, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. WCBW, Inc. ("petitioner"), licensee of Station WCBW(FM), Channel 285A, Columbia, Illinois, requests the substitution of Channel 285C3 for Channel 285A at Columbia, Illinois, and modification of its license for Station WCBW(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration since it could provide a wide coverage area FM station to Columbia. An engineering analysis has determined that Channel 285C3 can be substituted for Channel 285A at Columbia in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.2 kilometers (11.3 miles) northwest of the community.[1] The site restriction is necessary in order to avoid a short-spacing to a construction permit for Station WQHC(FM), Channel 284A, Nashville, Illinois. Channel 285C3 is short-spaced to Channel 285A, Station WTAO, Murphysboro, Illinois. That station was ordered to Channel 286B1 in MM Docket 89-526. *See* 5 FCC Rcd 3776 (1990). The allotment at Columbia is therefore contingent on the licensing of Station WTAO(FM) on the new channel, and issuance of a license for Channel 285C3 at Columbia may be withheld until Station WTAO(FM) is licensed on Channel 286B1. We shall also propose to modify the license of Station WCBW(FM) to specify operation on Channel 285C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Columbia, Illinois	285A	285C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the licensee of Station WTAO(FM), Murphysboro, Illinois.

C R Broadcasting, Inc.
344 Old Pinson Road
Jackson, TN 38305

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David M. Hunsaker
John C. Trent
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, Virginia 22101
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 285C3 are North Latitude 38-34-24 and West Longitude 90-19-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-644

In the Matter of

Amendment of Section 73.202(b), RM-7543
Table of Allotments,
FM Broadcast Stations.
(Crozet, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James Madison University ("petitioner") requesting the allotment of Channel 230A to Crozet, Virginia, as the community's second local FM service. Although petitioner requests that the Commission reserve Channel 230A for noncommercial use, petitioner states that it will apply for Channel 230A if allotted to Crozet as a commercial channel.

2. The Commission does not generally reserve a channel within the commercial band of the FM spectrum for noncommercial use, but instead reserves Channels 201-220 for such use. Exceptions to this policy have been made where channels in the noncommercial band are not available because of Canadian or Mexican allotments and where the use of the channels in the noncommercial educational band may result in potential interference to television operations on VHF Channel 6. *See Comobabi, Arizona*, 47 Fed. Reg. 32717, published July 29, 1982, and *Burlington and Newport, Vermont*, 45 R.R. 2d 786 (1979). In this instance, neither exception applies. Therefore, we will not propose the allotment of Channel 230A to Crozet as a noncommercial educational allotment, but rather as a commercial allotment. If so allotted, petitioner may, of course, apply for a license on Channel 230A as a noncommercial educational station.

3. Channel 230A can be allotted to Crozet in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.5 kilometers (5.9 miles) south of the community,[1] in order to avoid short-spacings to Stations WAZR-FM, Channel 229B1, Woodstock, Virginia, and WKYS-FM, Channel 230B, Washington, D.C. Since the proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules.

4. We believe the public interest would be served by proposing the allotment of Channel 230A to Crozet, Virginia, since it would provide the community with a second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Crozet, Virginia	272A	272A, 230A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James Madison University
Harrisonburg, Virginia 22807
Attn: Ms. Brenda Hankey
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 230A at the restricted site are North Latitude 37-59-02 and West Longitude 78-43-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-645

In the Matter of

Amendment of Section 73.202(b), RM-7556
Table of Allotments,
FM Broadcast Stations.
(Jesup and Midway, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by InterMart Broadcasting Georgia Coast, Inc. ("petitioner"), licensee of Station WGCO(FM), Channel 252C1, Jesup, Georgia, requesting the reallotment of Channel 252C1 from Jesup, Georgia, to Midway, Georgia, and the modification of Station WGCO(FM)'s license to specify Midway as its community of license.

2. Petitioner submits that the allotment of Channel 252C1 at Midway is mutually exclusive with its present allotment to Jesup. Petitioner points out that the reallotment of Channel 252C1 to Midway will provide that community with its first local FM service but will not deprive Jesup of its only local aural transmission service.[1] Petitioner states that Midway, an incorporated city with a mayor and council government, had a 1970 population of 167, a 1980 population of 457 and an estimated 1988 population of 760 persons. The city provides city services such as fire and police protection. Finally, petitioner states that in changing its community of license, Station WGCO will not be required to move its transmitter site.

3. A staff engineering analysis has determined that Channel 252C1 can be allotted to Midway in compliance with the Commission's minimum distance separation requirements with a site restriction of 22.5 kilometers (14 miles) south of the community at petitioner's current transmitter site.[2]

4. We believe the proposal warrants further consideration, as it could provide Midway with its first local FM transmission service. The proposal would not deprive Jesup of its only aural transmission service and the use of Channel 252C1 at Midway is mutually exclusive with its present allotment at Jesup. As requested, we will also propose to modify petitioner's license for Station WGCO(FM) to specify Midway as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 252C1 at Midway or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Jesup, Georgia	252C1, 288A	288A
Midway, Georgia	--	252C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036
(Attorney for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] In addition to Station WGCO(AM), Stations WLOP(AM), WIFO(FM) and noncommercial WLPT(FM) are licensed to Jesup.

[2] The coordinates for Channel 252C1 at Midway are North Latitude 31-36-45 and West Longitude 81-21-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-646

In the Matter of

Amendment of Section 73.202(b), RM-7524
Table of Allotments,
FM Broadcast Stations.
(Yreka, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Dalmation Enterprises, Inc. ("petitioner"), licensee of Station KYRE(FM), Channel 249C2, Yreka, California, proposing the substitution of Channel 280C1 for Channel 249C2 at Yreka and modification of its license to specify the non-adjacent, higher powered channel. Petitioner failed to state its commitment to apply for Channel 280C1 if it is allotted to Yreka, and should correct the deficiency in response to this *Notice*. *See* paragraph 2 of the attached Appendix.

2. An engineering analysis has determined that Channel 280C1 can be allotted to Yreka in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's present transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KYRE(FM) to specify operation on Channel 280C1. Section 1.420(g)(2) of the Commission's Rules permits the modification of a station's license to a non-adjacent, higher powered channel if an additional equivalent class of channel is available for use by other parties which submit competing expressions of interest. In this regard, petitioner states that Channel 293C1 can be allotted to Yreka in the event other parties express an interest in the use of the Class C1 channel. Channel 293C1 can be allotted to Yreka without the imposition of a site restriction.[2]

3. We believe the public interest would be served by proposing the substitution of Channel 280C1 for Channel 249C2 at Yreka, California, since it could provide an expanded coverage FM service to the community. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Yreka, California	249C2	280C1

4. The Commision's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Tillotson, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the licensed site of Station KYRE(FM) at Yreka are 41-36-34 and 122-37-29.

[2] Coordinates for Channel 293C1 at Yreka are 41-43-48 and 122-38-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-647

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Ladysmith and Hallie, Wisconsin)	RM-7180

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Stewards of Sound, Inc. ("petitioner"), licensee of Station WWIB(FM), Channel 279C, Ladysmith, Wisconsin, requesting the reallotment of its channel to Hallie, Wisconsin, and modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. Petitioner advises that the requested reallotment to Hallie is mutually exclusive with the existing allotment of Channel 279C at Ladysmith. Petitioner states that operating from its present site with existing facilities, Station WWIB(FM) places a 70 dBu signal over the entire community of Hallie. Petitioner adds that Ladysmith (population 3,826)[1] has two FM stations and one AM station.[2] Thus, petitioner's proposal would bring a first FM broadcast service to Hallie (population 4,275), and would not deprive Ladysmith of local service.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. We note that Hallie is partially within the Eau Claire Urbanized Area as defined by the United States Census. [3] We question whether Hallie is deserving of a first local FM service preference, or whether Hallie should be credited with all of the aural services licensed to the Eau Claire Urbanized Area. Petitioner is requested to submit information sufficient to show that Hallie is deserving of such a preference. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990).

4. We believe the public interest could be served by proposing to reallot Channel 279C from Ladysmith to Hallie, Wisconsin, if Hallie is deserving of a first local FM service preference. Therefore, we shall propose to modify Station WWIB(FM), as requested, to specify Hallie as its community of license. A staff engineering analysis reveals that Channel 279C can be allotted to Hallie in conformity with the Commission's rules and regulations at petitioner's specified site.[4] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional channel at Hallie.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the communities listed below, as follows:

City	Channel No. Present	Proposed
Hallie, Wisconsin	-----	279C
Ladysmith, Wisconsin	224A, 279C	224A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Tannenwald
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(Counsel for the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] Station WLDY(AM) and WLDY-FM are licensed to Ladysmith in addition to Station WWIB(FM).

[3] According to the 1980 U.S. Census, 2,017 of Hallie's 4,275 residents are included within the Eau Claire Urbanized Area.

[4] The coordinates for Channel 279C at Hallie are 45-06-35 and 91-09-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-648

In the Matter of

Amendment of Section 73.202(b), RM-7560
Table of Allotments,
FM Broadcast Stations.
(Weiser, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 24, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Treasure Valley Broadcasting ("petitioner"), licensee of Station KWEI(FM), Weiser, Idaho, seeking the substitution of Channel 300C2 for Channel 257A at Weiser, and modification of its license to specify operation on Channel 300C2. Petitioner states its intention to apply for the channel, if allotted.

2. We believe it would be in the public interest to consider petitioner's proposal because it could provide Weiser with a wide coverage area FM service. A Commission engineering analysis indicates that the proposal to allot Channel 300C2 to Weiser is mutually exclusive with a pending proposal to allot Channel 300C2 to Eagle, Idaho. *See Notice of Proposed Rule Making* in MM Docket 90-526, adopted October 22, 1990. Therefore, in an effort to accommodate petitioner's proposal, we sought an alternate channel and have determined that Channel 298C2 could be allotted to Weiser in compliance with the Commission's minimum distance separation requirements.[1] As requested, we shall propose to modify the license of Station KWEI(FM) to specify operation on Channel 298C2. In accordance with Section 1.420(g) of the Commission's Rules, however, should another party express an interest in the allotment, the modification cannot be implemented unless an equivalent class channel is available for allotment.

3. In view of the fact that Weiser could receive a wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Weiser, Idaho	257A	298C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Randal Williamson
Treasure Valley Broadcasting
P.O. Box 791
Weiser, Idaho 83672
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this proposed allotment are North Latitude 44-15-04 and West Longitude 116-58-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH (AT&T)	W-P-C 6622 I-T-C-90-163

Application under Section 214 of the Communications Act for authority to acquire certain lines of Western Union Corporation (WU)

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: December 28, 1990

By the Chief, Common Carrier Bureau:

1. Before the Bureau is an application filed by AT&T under Section 214 of the Communications Act of 1934, 47 U.S.C. § 214 (Application), for authority to acquire by lease the lines currently used by WU to provide Teletypewriter Exchange Services (TWX) and Telex services.[1] The application is opposed by TRT and Graphnet, Inc.[2] For the reasons discussed, below we grant the requested authorization subject to condition and otherwise deny the oppositions.

I. APPLICATION.

2. AT&T seeks authority to acquire certain assets of WU's Business Services Group, including the assets used to provide TWX and Telex services, pursuant to an Agreement of Purchase and Sale (Agreement).[3] AT&T originally stated that the closing under the Agreement was scheduled to occur on September 30, 1990.[4] AT&T states that the lines it proposed to acquire from WU are those currently used by WU to provide domestic and international TWX and Telex services as well as a range of other services.[5] AT&T states that these lines are leased by WU from interexchange and local exchange carriers throughout the U.S.[6] WU currently operates the interexchange lines under a lease from Telecom U.S.A. (Telecom). AT&T intends to enter into a replacement agreement with the successor to Telecom, the terms of which AT&T will advise the Commission once they are negotiated.[7]

3. AT&T states that it does not now provide Telex and TWX services but that it does provide other services to all geographic locations covered by WU's lines. AT&T intends to continue to provide the Telex and TWX services presently provided by WU.[8] AT&T states that to the extent some acquired facilities can be integrated with other AT&T facilities, some of the acquired property will be removed from service. It states that there will be no increase in the property devoted to the public service arising out of the proposed acquisition.[9] It represents that accounting for the acquisition will be performed in accordance with the Uniform System of Accounts for Class A Telephone Companies, Part 32 of the Commission's Rules.[10]

4. AT&T argues that the proposed acquisition will not adversely affect competition.[11] It states that two thirds of the revenues from the Telex and TWX business which AT&T proposes to acquire from WU are from international non-IMTS services, in which the Commission has declared AT&T non-dominant.[12] It asserts that no adverse competitive consequences will result from a transaction in which a non-dominant carrier acquires facilities from another such carrier.[13] AT&T adds that it will be subject to vigorous domestic competition from other global messaging offerings, including other providers' Telex services, fax and electronic mail.[14]

5. AT&T states that the proposed transaction is in the public interest because it will provide WU with cash needed to finance a proposed recapitalization.[15] It adds that acquisition will permit WU to exit a business that it has found increasingly difficult to support financially while, at the same time, enabling AT&T to serve customers in the highly competitive and expanding global messaging industry.[16]

II. COMMENTS AND DISCUSSION.

6. *Market Dominance*. The application is opposed by TRT. It states that with the consummation of the proposed purchase, AT&T would obtain by far the largest share of the market for electronic messaging services and would then hold predominant market shares in all significant United States interexchange services submarkets, except for, perhaps, international private line services.[17] TRT states that AT&T has been held by the Commission to be dominant in the domestic interexchange services market and in the market for international message telephone services (IMTS).[18] It adds that WU, through internal expansion and through its acquisition of one of the largest international record carriers (IRCs), ITT World Communications, Inc., has succeeded in obtaining a major share of the telex business. TRT notes that WU still retains the largest base of telex and telex equivalent subscribers in the U.S.; TRT is concerned that other telex carriers would be unable to provide a universal telex service to their subscribers without reasonable access to the subscribers on WU's networks.[19]

7. TRT argues that the principal issue presented by AT&T's application is whether it is in the public interest to authorize AT&T, the overwhelmingly predominant United States carrier, with more than a two-thirds share of the overall interexchange services market, to buy increased market share and market power by purchasing the business of a leading service provider in a submarket in which AT&T is presently a significant competitor but not predominant.[20] TRT states that AT&T fails to address this issue in its application and circumvents it by merely arguing that AT&T has been found to be non-dominant in one telecommunications service submarket, i.e., non-IMTS international services. TRT distinguishes the case of *Telecom USA, Inc.* where the acquisition of one non-dominant carrier, Telecom, by another non-dominant carrier, MCI, was found not to result in anti-competitive consequences. On the other hand, AT&T, it argues, is much larger in resources and market share than all of its competitors combined,[21] and that in *Telecom USA, Inc.* MCI argued that its acquisition of Telecom would enable it to compete on more equal terms with AT&T.[22] TRT

states that it is not in the public interest to permit AT&T to obtain its goal of predominance in this submarket by the purchase of the business of the market leader.[23]

8. Graphnet states it is a competitor with WU in the provision of international and domestic electronic messaging services.[24] Graphnet states that it is most concerned that the Commission not deviate from its normal policy of subjecting acquisitions of the sort at issue here to a searching and methodical analysis of the transaction's potential to result in a diminution of competition or restraint of trade.[25] Graphnet urges that there is very real cause for concern that the acquisition by AT&T of WU's core electronic messaging capacity will diminish competition. It asserts that in acquiring WU's telex capacities and customers, AT&T will instantly assume approximately 60% of the telex market, a market share larger by approximately 50% than that of the second place company, MCI, which is an even more distant second to AT&T in the voice market share. It adds that the market-leading position of WU's EasyLink electronic mail service, when combined with that of (now) sixth place AT&T Mail, will yield a combined total market share of 37% of that rapidly growing market. According to Graphnet, no firm now ranking between Easylink and AT&T Mail has more than 14% of the total market revenue.[26] Graphnet states that in the electronic messaging industry, a well-respected industry newsletter calculates AT&T's percentage share after the WU purchase as "an amazing 43% of the messaging industry . . . ."[27] Graphnet points out that, to a "microscopically small competitor such as Graphnet, creating a market entity of that magnitude is a threatening prospect which the Commission ought not to endorse without the most careful scrutiny."[28]

9. AT&T counters that Graphnet fails to provide any support or citation for its claimed market share percentages which, it states, are incorrect.[29] AT&T states that there is no merit to claims that this transaction will substantially lessen competition in any market.[30] It argues that pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C § 18(a), the Department of Justice has already reviewed AT&T's transaction with WU, and has not objected to the proposed acquisition.[31] According to AT&T, the relevant market for purposes of the instant transaction is "electronic messaging services," and that market includes not only telex and electronic mail services, but also public and premises-based facsimile and voice messaging services, value added networks, and electronic data interchange.[32] It states that the domestic electronic messaging market is large and is also unconcentrated.[33] AT&T estimates that the total revenues for these electronic messaging services were more than $4.3 billion in 1989.[34] AT&T submits that no firm had a market share of greater than 11 percent of these services and the combined shares of AT&T and Western Union were only 7.8 percent.

10. TRT disagrees with AT&T's definition of the relevant market.[35] It states that AT&T relies on an apparent estimate of a market, not for electronic messaging services, but for electronic messaging products.[36] TRT argues that the two largest participants in this market are Japanese equipment manufacturers, Sharp and Murata, which clearly do not compete with AT&T or WU in the provisions of electronic messaging services.[37]

11. Section 7 of the Clayton Act forbids the acquisition of the assets of a company by another company if the acquisition may substantially lessen competition or tend to create a monopoly.[38] The Commission must consider this issue as an element of its public interest finding.[39] An assessment of possible anticompetitive consequences begins with a determination of the relevant market.[40] The relevant market generally is defined by considerations of substitutability both in terms of supply and demand. Two distinct product markets are involved here, domestic interstate interexchange service,[41] and non-international message telephone service.[42] We shall examine each market separately.

12. First, as to the domestic interstate interexchange market, the proposed acquisition will not substantially lessen competition or tend to create a monopoly. Although AT&T still is dominant in that market, its market share of total revenues has declined over the last decade while that of its competitors has increased. In terms of total toll revenues for interexchange telecommunications, in 1989 AT&T had a 67.4 percent share of the market.[43] WU's share of this market is less than half of one percent.[44] AT&T's purchase of WU's limited market share cannot be said to substantially lessen competition in that market.

13. Second, as to the non-IMTS market, we do not believe the proposed acquisition raises anticompetitive concerns, especially given the conditions we are attaching to this authorization.[45] AT&T has approximately a 9.1 percent share of the non-IMTS market. WU has a 22.1 percent share of the non-IMTS market market.[46] Both AT&T and WU are considered non-dominant in the non-IMTS market.[47] AT&T's proposed acquisition will not substantially lessen competition because even after the acquisition AT&T's share will be only 31.2 percent of that market. We also find that this increase in AT&T share is not sufficient to change AT&T's non-dominant status in the non-IMTS market.[48]

14. The record also demonstrates that the Department of Justice reviewed this transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C §18 (a), and it did not object to the proposed acquisition or otherwise question its lawfulness. We find that TRT's statement that AT&T relies on an apparent estimate of a market, not for electronic messaging services, but for electronic messaging products, to be irrelevant to our market analysis. Similarly, Graphnet's assessment of the market fails to identify the relevant market and its conclusions are unsupported by any data.

15. In addition, any analysis of whether the grant of the application causes market distortions inimical to the public interest must take into account the current financial difficulties of WU. The record indicates that WU is facing a cash flow emergency which may jeopardize service to current TWX and telex customers. The proposed acquisition should alleviate that risk. The record does not indicate that any other competitor is interested or able to purchase these facilities from WU.

16. No evidence in the record suggests that the proposed acquisition would result in a substantial lessening of competition or tend to create a monopoly. Graphnet and TRT have failed to support their claims of marketplace inequities with any quantifiable data in a manner which outweighs WU's clear and immediate need to sell facilities it can no longer maintain. Therefore, AT&T's application to acquire by lease the lines currently used by WU to provide TWX and Telex services comports with the applicable provisions of the Clayton Act, and the grant of the application will serve the public interest by permitting

telecommunications resources to move to a higher valued use and by avoiding an immediate risk of termination of service to the public.

17. *International Accounting Rates*. Graphnet also argues that AT&T has induced several foreign telecommunication authorities to extend to it favorable IMTS accounting rates that were not made available to AT&T's competitors.[49] It states that AT&T has done the same for its packet services.[50] Graphnet urges that, if AT&T acquires WU's telex and TWX facilities, there is no reason to believe AT&T will not do the same with these services.[51] Graphnet adds that the Commission's proposed new approach to the regulation of accounting rates has a series of safeguards to protect competition that would not immediately constrain AT&T if it is permitted to assume WU's international business.[52] Graphnet submits that any grant of AT&T's application must be conditioned upon a requirement that AT&T be obliged, at least during the pendency of the foreign accounting rate rule making, to adhere to the requirements set out in *Regulation of International Accounting Rates*.

18. AT&T replies that there is no basis to impose this condition.[53] AT&T states that existing procedures already require the filing of waiver applications for different record service accounting rates by individual carriers.[54] It notes that all of the prior accounting rate changes negotiated by AT&T which Graphnet cites in its opposition were subject to such Commission review and were permitted by the Commission to take effect.[55]

19. The condition that Graphnet requests be imposed on AT&T in this proceeding is one element of a proposal to implement a notification option for simple reductions in the accounting rate with a single foreign telecommunications administration rather than requiring carriers to request a waiver of the international settlements policy (ISP) which is being considered in CC Docket No. 90-337, *Regulation of International Accounting Rates*.[56] Whether that condition should be adopted as a part of the notification option is an issue which is appropriately considered in that Rule Making proceeding. Graphnet has not adequately demonstrated why the current procedures for enforcing the ISP are inadequate to deal with AT&T's provision of the services it will initiate as a result of grant of the instant application until such time as a Report and Order in CC Docket No. 90-337 can be issued. Therefore, we deny Graphnet's request that we impose the proposed condition on AT&T at this time.

20. *Telex Interconnection Arrangements*. TRT further argues that AT&T's acquisition of WU's telex, TWX and interconnected Easylink services could jeopardize the continuation of the telex interconnection arrangements established in accordance with the Record Carrier Competition Act of 1981 (RCCA).[57] TRT explains that although the provisions explicitly governing the initial establishment of record carrier interconnection contained in the RCCA have now "sunsetted", there are remaining non-sunsetted provisions which continue to protect the right of each record carrier to equitable interconnection.[58] TRT states that although these requirements are currently binding upon WU, it does not appear that these provisions would be applicable to AT&T as the owner and operator of WU services.[59] TRT notes that the result would be the elimination of any explicit legal requirement for the telex provider with the largest number of subscribers to interconnect its networks upon equitable terms with the networks of the other telex providers. TRT, therefore urges the Commission to impose the following conditions, as a minimum, upon any grant of AT&T application:

> 1. AT&T is required to continue in effect the present interconnection arrangements with the other record carriers, except as it and the other record carriers shall mutually agree to modify or discontinue such interconnection arrangements.
>
> 2. AT&T's charges to other record carriers for the termination of telex or enhanced telex traffic on its domestic telex and TWX networks shall be no higher than the charges for such network termination that AT&T collects from its own international telex carrier (within the meaning of Section 222(c)(1)(B) of the Communications Act) or from its most favored telex customer, enhanced service customer or foreign correspondent.[60]

21. AT&T counters that the RCCA is inapplicable to AT&T because that statute by its explicit terms "does not include any common carrier which derives a majority of its revenues during any calendar year from the provision of services other than record communications service."[61] It adds that in all events, AT&T has already filed tariffs for interconnection of its telex services with other record carriers which are identical in all material respects to WU's existing tariffs.[62] AT&T further states that WU has entered into an agreement with TRT and other record carriers specifying safeguards for interconnection arrangements to which AT&T will become subject as part of its acquisition of WU's telex business.[63] AT&T notes that the Commission has previously concluded that the interconnection agreement provides sufficient protection for other record carriers' interests to obviate imposing additional conditions on a Section 214 application involving WU's facilities.[64]

22. TRT responds that AT&T now opposes the application of the same RCCA requirements to its provision of record services that are applicable to TRT/FTC and other carriers.[65] TRT submits that although AT&T intends voluntarily to continue interconnection arrangements in place and to abide generally by the requirements of the RCCA, corporate strategies and corporate managements change over time and both the Commission and the smaller record carrier competitors should have more than the continued good will of AT&T to rely upon to be assured of fair record carrier interconnection arrangements in the future.

23. We find that it is in the public interest to require AT&T to continue WU's current interconnection obligations. AT&T gives assurances that it already considers itself bound by these agreements as the successor to WU.[66] Thus, it appears that imposing such a condition would not result in a burden upon AT&T. Interconnection arrangements have been found to be an integral element in maintaining competition in this marketplace, and we do not intend by this authorization to weaken those findings. [67] Thus, we condition this authorization on AT&T's assuming WU's current interconnection agreements until the expiration of each such agreement,[68] at which time AT&T shall continue to be subject to the same RCCA interconnection requirements applicable to the networks of its telex and TWX competitors. Should

marketplace considerations require reexamination of this condition in the future, AT&T may petition for such reexamination.

24. In view of the foregoing, the Bureau concludes that grant of the application as conditioned serves the public interest by enabling AT&T to continue service for WU's current customers while maintaining a competitive marketplace.

25. Accordingly, IT IS CERTIFIED, that acquisition and operation of the facilities described in the application of American Telephone and Telegraph Co., File Nos. W-P-C 6622 and I-T-C-90-163 IS REQUIRED by the public convenience and necessity.

26. IT IS ORDERED, that this authorization is subject to AT&T's assuming WU's obligations under interconnection agreements in effect until the expiration of each such agreement, at which time AT&T shall continue to be subject to the same interconnection requirements applicable to the networks of its telex and TWX competitors.

27. IT IS FURTHER ORDERED, that failure to notify the Commission in writing within thirty days of the release date of this memorandum opinion and order that the authorization as conditioned is unnacceptable will constitute acceptance thereof. In the event of such notification, this authorization is void pending further order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone,
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T filed an application for Special Temporary Authority pursuant to §63.04 of the Commission's rules, concurrently with the Section 214 Application. Because we grant the Section 214 authorization, the request for special temporary authority is moot and is hereby dismissed.

[2] A Petition to Deny or to Impose Conditions was filed by TRT/FTC Communications, Inc. (TRT). Graphnet, Inc. (Graphnet) filed comments. AT&T filed a Response to these pleadings. TRT filed a Reply to AT&T's Response.

[3] Under separate cover, AT&T has transmitted to the Commission a voluminous computer printout detailing the lines to be acquired. AT&T requests that the Commission accord this printout confidential treatment under Sections 0.457 and 0.459 of the Commission's rules. It appears that these materials contain commercial information which would not customarily be made available to the public by AT&T. AT&T's request for confidential treatment is granted.

[4] *See* AT&T letter to the Commission dated September 27, 1990. The closing date has been deferred, according to AT&T.

[5] Application at 2. AT&T states it will also acquire certain access node processors and packet switches at many points in the United States and in London, England, as identified in schedules to the Agreement.

[6] Application at 3.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 3-4.

[10] *Id.* at 4.

[11] *Id.*

[12] Application at 4 citing, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d 1435 (1986).

[13] Application at 5 citing, *Telecom USA, Inc.*, File No. ENF-90-08, Memorandum Opinion and Order, DA 90-1018, released August 1, 1990, para. 11.

[14] Application at 5.

[15] *Id.* at 6. AT&T attaches to its request for Special Temporay Authority dated August 15, 1990, an affidavit by the Senior Vice President of WU stating that WU is facing a near-term and long-term liquidity crisis which cannot be supported by operating cash flow. He states that due to the substantial uncertainty and speculation circulating with respect to the financial condition and prospects of the corporation, it is critical to the interests of the corporation to consummate the AT&T sale as soon as possible. Affidavit of John C. Walters, Vice President WU, at 2.

[16] Application at 5. AT&T states that global messaging is the capability to exchange information between a multitude of sources -- such as teleprinters, computer terminals, facsimile (fax) machines, or telephones -- in a multitude of forms -- such as text, data or voice -- anywhere in the world. Telex and TWX represent two forms of such messaging capabilities. *Id.* at 6.

[17] TRT Petition to Deny or to Impose Conditions (TRT Petition) at 2-3.

[18] TRT Petition at 3.

[19] *Id.* at 4.

[20] *Id.* at 5.

[21] *Id.* at 6.

[22] *Id.*

[23] *Id.* at 7.

[24] Graphnet Comment at 1.

[25] *Id.* citing, 47 U.S.C. § 602, 15 U.S.C. § 18.

[26] *Id.* at 3-4. Graphnet states that in order of their rank these are SprintMail, Dialcom, CompuServe and MCI Mail.

[27] *Id.* at 4 citing, *Electronic Mail & Microsystems* (July 16, 1990).

[28] *Id.* Graphnet further argues that WU facilities employed by AT&T in the provision of enhanced services should be placed in a separate subsidiary. This argument was addressed and rejected in *In the Matter of AT & T Petition for Limited Interim Waiver of the Requirements of Third Computer Inquiry*, 5 FCC Rcd _____, released October 22, 1990 (Common Carrier Bureau).

[29] AT&T Response to Oppositions (AT&T Response) at 1.

[30] *Id.* at 2.

[31] *Id.* at 3.

[32] AT&T Reply at 4.

[33] *Id.* at 6.

[34] Exhibit A to AT&T's response is the affidavit of its Marketing Director which describes the data sources and methodology underlying AT&T's market estimate. As part of the estimate, the affidavit provides proprietary information on AT&T and WU's revenues for individual segments of the messaging market. AT&T requests that the Commission accord confidential treatment to the affidavit under Sections 0.457 and 0.459 of the Commission's rules. That request is granted. A non-confidential version of the affidavit has been publicly filed by AT&T with its Response.

[35] TRT Reply to AT&T Response (TRT Reply) at 2.

[36] *Id.*

[37] *Id.*

[38] *See* 15 U.S.C. § 18.

[39] *See GTE Corporation and Southern Pacific Co.*, 94 FCC 2d 235, 249 (1983).

[40] *See Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962).

[41] All interstate domestic interexchange telecommunications have been defined as a single product market. *See Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorization Therefor*, 95 FCC 2d 554, 573-575 (1983).

[42] In *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d 1435 (1986), the Commission found that international telecommunications services are made up of two distinct product markets, IMTS (international message telephone service) and non-IMTS. Non-IMTS includes telex, telegram, TWX, private line, high speed data, video conferencing and Intelsat Business Service (IBS). *See* 102 FCC 2d at 823-828.

[43] *See In re Applications of Telecom USA and MCI*, 5 FCC Rcd. 4857 (Common Carrier Bureau 1990). This compares to a share of approximately 90 percent in 1984. *See also Long Distance Market Shares: Second Quarter, 1990*, released September 24, 1990 by the Industry Analysis Division, Common Carrier Bureau at Table 4.

[44] Total transmission revenues for 1989 amounted to approximately 66 billion dollars. *See Long Distance Market Shares: Second Quarter 1990*, released September 24, 1990 by the Industry Analysis Division, at Table 4. WU's total transmission revenues for 1989 were 350 million -- a .53 percent share of the market. *See Preliminary Statistics of Communications Common Carriers*, released July 6, 1990 by the Industry Analysis Division, at Table 3.2.

[45] *See infra* para. 23.

[46] *See Trends in the International Telecommunications Industry*, Mimeo 10347, released October 31, 1990 by the Industry Analysis Division, at Table 5. The percentages used herin were calculated using data for telephone private line revenues from Table 6 and international record carrier combined revenues from Table 7 of the report.

[47] *See International Competitive Carrier Policies*, 102 FCC 2d, at 833-838.

[48] Because AT&T is non-dominant in the provision of non-IMTS services and indicates that it already has been authorized to acquire circuits to provide non-IMTS services to all of the countries served by the circuits it proposes to acquire from WU, we need not authorize AT&T to acquire these circuits. *See International Competitive Carrier Policies*, 102 FCC 2d at 845. However, AT&T must report its acquisition of these circuits in accordance with the provisions of Section 63.10 of the Commission's Rules.

[49] Graphnet Comments at 4 citing, *AT&T*, 2 FCC Rcd 6409, *aff'd on recon.*, 2 FCC Rcd 7537 (1987).

[50] Graphnet Comments at 4-5.

[51] *Id.*

[52] Graphnet Comments at 5 citing, *International Accounting Rates*, 5 FCC Rcd 4948, 4949 (1990): "[i]f a foreign telecommunications administration implements a lower accounting rate with one U.S. carrier, it must be prepared to offer the same rate to all U.S. carriers serving that country . . . U.S. carriers would be required to 'accept' only their proportionate share of return traffic from a given country."

[53] AT&T Response at 3.

[54] *Id.* at 10, citing, *Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, 2 FCC Rcd 1118 (1987).

[55] *Id.*

[56] *See International Accounting Rates*, 5 FCC Rcd at 4849.

[57] TRT Petition at 7. *See also* RCCA, 47 U.S.C. § 222.

[58] *Id.* at 8 citing, 47 USC §222(c)(1)(B). The RCCA provides that in any case in which such separate domestic record carrier furnishes interconnection to such separate international record carrier, any interconnection which such separate domestic record carrier furnishes to other international record carriers shall be (I) equal in type and quality; and (II) made availabe at the same rates and upon the same terms and conditions. 47 USC § 222(c)1(B)(ii). The RCCA also requires that any interconnection which such separate international record carrier furnishes to to other domestic record carriers shall be (1) equal in type and quality; and (II) made available at the same rates and upon the same terms and conditions. 47 USC § 222(c)(1)(B)(iii).

[59] *Id.* at 8.

[60] TRT Petition at 9.

[61] AT&T Response at 9 citing, 47 U.S.C. § 222(a)(2). Under the RCCA, the term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations. *Id.*

[62] AT&T Response at 9.

[63] *Id.* at 9-10.

[64] *Id.* at 10. *See also Western Union Corporation*, 2 FCC Rcd 6063, 6065 (1987). No party may withdraw from the agreement without giving six months prior notice. AT&T states that the Commission has recognized that this interval provides other signatories adequate time to pursue alternative arrangements or, if appropriate, to seek relief from the Commission. *Id.*

[65] TRT Reply at 3.

[66] *See supra* para. 21.

[67] AT&T cites to *WU*, 2 FCC Rcd 6063 (1987), for the proposition that the Commission has previously concluded that the interconnection agreement provides sufficient protection to obviate imposing a condition on a Section 214 application. *See supra* note 64. However, in deciding not to impose a condition in that case, the Bureau relied on the fact that statutory safeguards in 222(c)(1)(B) and 201(a) of the Act guarantee interconnection for the provision of international services and provide procedures for the IRCs to assert their rights. *See* 2 FCC Rcd 6065 at para. 24. Here, AT&T argues it is not subject to Section 222 of the Act.

[68] The Bureau notes that all parties to such interconnection agreements retain the ability to agree mutually to modify or discontinue the agreements.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-313

In the Matter of

Policies and Rules Concerning Operator Service Providers — RM-6767

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1990; Released: December 21, 1990

By the Commission:

I. INTRODUCTION

1. On October 17, 1990, the President signed into law the Telephone Operator Consumer Services Improvement Act of 1990.[1] The purpose of the Act is "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."[2] Under the Act, this Commission must, *inter alia*, conduct a "general" rule making proceeding to prescribe regulations that will implement statutory provisions and establish certain standards and policies, and a monitoring/reporting proceeding that will ultimately result in three reports to Congress.[3] We therefore adopt this Further Notice of Proposed Rule Making in order to: (1) "initiate" the general rule making and monitoring/reporting proceedings required by the Operator Services Act;[4] (2) propose the required rules; (3) invite any additional comments that are necessary beyond those submitted in response to our initial Notice of Proposed Rule Making in CC Docket No. 90-313;[5] (4) solicit such further information as is necessary to ensure that the objectives of the Act are satisfied;[6] and (5) declare that, under the Act, the access and payphone compensation issues must be considered in a separate proceeding.[7] The rules proposed herein shall supplant those proposed in the initial *NPRM*.

II. BACKGROUND

2. We noted in our initial *NPRM* that, *inter alia*, the divestiture of AT&T had led to the entry of competitors into the interstate operator services industry that had previously been dominated by the Bell System.[8] The newer operator service providers (OSPs) are sometimes known as alternative operator service (AOS) companies. AOS companies generally lease lines from telephone carriers and combine these transport elements with their own operator services. Then, like the more traditional OSPs, they enter into contracts to provide operator services to "call aggregators," entities that make telephones available to the public or transient users of their premises.[9] A caller using an aggregator's telephone will automatically be connected to this "presubscribed" OSP unless an access code[10] is dialed.

3. This expansion of the operator services industry led not only to a degree of competition among OSPs, but also to "widespread consumer dissatisfaction over the rates and practices of many operator service providers."[11] One sign of this dissatisfaction was a complaint filed by two consumer advocacy groups against five AOS companies.[12] In the *TRAC Order*, the Common Carrier Bureau (Bureau) granted the complaint in part and ordered the defendant companies to, *inter alia*: (1) provide written information about their services to be posted on or near presubscribed telephones; (2) identify themselves audibly at the beginning of calls, a process known as "call branding"; (3) discontinue the blocking of access to other OSPs; and (4) cease "call splashing" to the extent technically possible.[13]

4. Shortly after the *TRAC Order* was released, the National Association of Regulatory Utility Commissioners ("NARUC") filed a petition for rule making, asking us to address a number of issues regarding the practices, policies, and appropriate regulatory treatment of OSPs.[14] In May 1989, the Bureau issued a Public Notice inviting comments on the NARUC Petition, and a number of responses were filed.

5. On June 14, 1990, this Commission adopted the initial *NPRM* in CC Docket No. 90-313. In the *NPRM*, we granted the NARUC Petition to the extent that it sought a broader Commission inquiry into the practices of the operator services industry.[15] More significantly, we proposed specific rules aimed at solving problems in the industry that had persisted despite previous Commission action.[16] Besides inviting comments on the rules themselves, we asked interested parties to express their views on a number of related issues that were not the subject of proposed rules. [17] Parties filed their initial comments by September 7, 1990.

6. Concurrently with the Commission's examination of operator service issues, Congress was considering specific legislative proposals that were intended to curb certain practices in the operator services industry and to preserve a (caller's right to just and reasonable rates. During the first week of October 1990, Congress passed the Operator Services Act, which the President signed into law shortly thereafter. Following passage of the Act, the Bureau issued an order that extended the date for filing reply comments in CC Docket No. 90-313 and that asked parties who intended to file reply comments to discuss the effects of the Act on that proceeding.[18] In addition, the Bureau released a public notice dealing with the Act's informational tariff filing requirements.[19] The notice described who must file such tariffs and the information that the tariffs must contain.[20] It also established filing procedures and set out the format with which the tariffs must conform.

III. DISCUSSION

7. After considering both the text of the Operator Services Act and the reply comments filed in CC Docket No. 90-313, [21] we conclude that it is necessary to adopt a *Further NPRM* in this docket. We think such action is required for several reasons.

A. The General Rule Making Proceeding

8. First, Section 226(d)[22] of the Act directs the Commission to "initiate" a general rule making proceeding to prescribe the regulations described by the Act.[23] This *Further NPRM* will serve to formally "initiate" the general proceeding. In addition, our original proposed rules are not, in all respects, identical to the requirements of the Act. Hence, in order to ensure that the Act is satisfied by this rule making: proceeding, we are adopting this *Further NPRM* to propose new, comprehensive rules that are modeled directly on the text of the Act.[24] These new rules will supersede those proposed in the initial *NPRM*. For the most part, however, the rationale for each new proposed rule will be similar to the rationale set out for the analogous rule in the initial *NPRM*, and we will not repeat that discussion here.

9. We therefore seek comment on the new proposed rules contained in Appendix B and ask that interested parties pay special attention in their comments to provisions that differ significantly from the rules proposed in the initial *NPRM*. We wish to emphasize, however, that parties need not repeat the views contained in their previously submitted comments. We intend to give full consideration to all relevant comments, including those filed during the initial stages of this proceeding.

10. Several of the new proposed rules depart somewhat from the treatment given the same topics in the initial *NPRM*. For example, the new rules would require double branding [25] and the posting of the address of the Bureau's Enforcement Division on or near aggregator telephones,[26] while the earlier proposed rules required only single branding and did not require the latter posting. The new rules also prohibit OSPs from charging for most unanswered calls[27] and aggregators from placing a higher surcharge on access code calls than on calls using the presubscribed OSP,[28] topics on which we did not originally propose rules. Further, the new rules would only prohibit, as the Act does, the blocking of 800 and 950 access,[29] while the original proposed rules would have prohibited 10XXX blocking as well.[30] At the same time, the new rules, like the Act, require only new aggregator equipment to have the 10XXX access capability;[31] we originally proposed that both new and existing equipment be required to have this capability. We have also proposed a definition section,[32] which we did not do in the initial *NPRM*, and a somewhat different splashing rule[33] based on the Act.

11. In addition, the Operator Services Act specifically requires us to adopt regulations that establish: (1) minimum standards for OSPs to use in the routing and handling of emergency calls;[34] and (2) a policy for requiring OSPs to make public information about recent changes in operator services and choices available to consumers in that market.[35] Neither of these subjects was discussed at length in the initial *NPRM*.

12. We noted in the *NPRM* that NARUC had recommended in its rule making petition that we consider adopting nationwide standards for the handling of emergency calls by OSPs.[36] The purpose of such standards would be to ensure that emergency calls are efficiently routed to the appropriate local public safety organization. In response to NARUC's recommendation, we simply requested comment on the topic rather than proposing a rule, explaining that we have traditionally deferred to the states in this area because of the local nature of such calls. Given the requirements of the Operator Services Act, however, we now propose and seek comment on a specific rule, Section 64.706, that sets out a minimum standard for the routing and handling of emergency calls by OSPs. While we have suggested in the proposed rule that only calls made via an "emergency" dialing sequence (e.g., "0," "911") be covered by the rule, we seek comment on whether it is possible for an OSP to receive emergency calls that are initiated in some other way. We also tentatively conclude that when an OSP connects a call to the "appropriate emergency service of the call's originating location," the call must be routed not only to the proper type of service, such as a fire department, but also to the service that serves the caller's location. For example, it would not be appropriate to route a call to an urban fire department when a caller is actually in a suburban locale.

13. We also seek comment on our proposed rule concerning public dissemination of information by OSPs, Section 64.707. As a matter of policy, we find that it is essential for participants in the operator services industry to communicate with the interested public. Regular publication of the described materials will help to ensure that "consumers have the opportunity to make informed choices"[37] when placing interstate calls. Under this proposed rule, we would expect an OSP to make available, upon request, written information that describes not only its own services and recent changes in those services, but also the services and trends in the industry as a whole. In addition, the information must include descriptions of any recent changes in the choices available to consumers in the operator services market and the methods by which they may exercise those choices. Unlike the reporting they would provide as to their own services, however, we do not intend that OSPs be required to publish lengthy details about their competitors' rates and services. Instead, we contemplate the publication of generic descriptions of any recent innovations in services and consumer choices. We specifically seek comment on how detailed this information must be to satisfy Section 226(d)(4)(B) of the Act, which is the statutory basis of our proposed rule.

B. CC Docket No. 90-313 - Phase II

14. Next, this *Further NPRM* will serve to initiate the proceeding required by Section 226(h)(3) of the Act, which directs the Commission to "initiate" a proceeding to determine whether the regulatory objectives specified in Section (d)(1) are being achieved. Those provisions of the Act seek, first, to ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services to place interstate calls and, second, to ensure that consumers have the opportunity to make informed choices in making such calls. Toward that end, the Act directs the Commission to (1) monitor operator service rates (Section 226(h)(3)(A)(i)); (2) determine the extent to which offerings made by providers of operator services improve operator services in various respects (Section 226(h)(3)(A)(ii)); (3) report on operator service rates, incidence of complaints, and service offerings (both in the aggregate and with respect to particular OSPs) (Section 226(h)(3)(A)(iii)); (4) consider the effect of commissions and various other costs of doing business on the rates operator service providers charge consumers (Section 226(h)(3)(A)(iv)); and (5) monitor compliance with the Act, including the periodic placement of telephone calls from aggregator locations (Section 226(h)(3)(A)(v)).

Section 226(h)(3)(B) directs the Commission to report on the progress of this proceeding 5, 11, and 23 months after its initiation.

15. The Operator Services Act does not direct that the proceeding required by Section 226(h)(3) be separate from other proceedings that Congress has instructed us to initiate. Indeed, because the purpose of the proceeding required by Section 226(h)(3) is to determine whether the regulatory objectives specified in Section 226(d) are being achieved, we conclude that administrative efficiency dictates that we conduct the two proceedings jointly in the same docket, with issues raised by Section 226(h)(3) being designated "Phase II." Therefore, we seek comment in this docket on the proposed reporting requirements outlined below and on other issues raised by Section 226(h)(3).[38]

16. In order to monitor and report on certain aspects of the operator services industry as required by Section 226(h)(3)(A) and (B), we conclude that we will need information beyond that provided by the informational tariffs that OSPs will file under Section 226(h)(1). Hence, we now propose that OSPs be required to file additional information with the Common Carrier Bureau. This information, which is described below, would have to be filed not later than 6, 9, 15, and 21 months after release of this *Further NPRM*.

17. First, pursuant to Section 226(h)(3)(A)(i) and (iii), we propose that OSPs subject to the terms of the Act be required to submit compilations of their rates at each of the intervals noted above. We tentatively conclude that each report should state the percentage change in each rate element since January 1, 1991, or since the date of the last report, whichever is more recent.[39]

18. Next, pursuant to Section 226(h)(3)(A)(iii), we propose to require each OSP to file, at the intervals noted above, a statement of the number of complaints each OSP has received each month since January 1, 1991 or since the date of its last report, whichever is more recent. This statement should include both complaints received directly from consumers and complaints filed with this Commission or other governmental bodies and should indicate the incidence of complaints, *i.e.*, the number of complaints received divided by the number of calls attempted by consumers during each month covered by the report. We recognize that in many instances it may not be clear whether consumers are complaining about interstate or intrastate calls. Accordingly, we propose that the reports cover all complaints. The reports should, when possible, indicate the actual numbers of interstate and intrastate complaints and the percentages of total complaints that those numbers represent. If and only if such a distinction cannot be made, the reports should include the total number of complaints and an estimate of the percentage of complaints that relate to interstate calling. The reports should also classify and quantify the complaints using the following categories: (1) rate charged; (2) blocking of access to carriers other than the presubscribed one; (3) call splashing; (4) call quality; (5) failure to comply with other statutory requirements or FCC rules; and (6) other complaints. We seek comment on these categories.

19. Section 226(h)(3)(A)(iv) requires the Commission to consider the effect that commissions, surcharges, billing and validation costs, and other costs of doing business will have on the overall rates charged to consumers. Therefore, we also propose to require OSPs to file certain cost data in order to provide a record of the effect of various costs on the overall rates that consumers pay for operator services, as required by this section. Specifically, we propose to require OSPs to state their total capital investment, total expenses, and total revenue for the period from January 1, 1991 to the date of each report. Reports of expenses should separately state the amounts of commissions and surcharges that OSPs pay as well as their costs for billing and validation, total salaries and other benefits to\officers and employees, and all other expenses.

20. In addition to comments on the proposed reporting requirements outlined above, we solicit comment on the matters raised by Section 226(h)(3)(A)(ii) and Section 226(h)(3)(A)(v). Specifically, commenters should address the extent to which service offerings made by operator service providers are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market. Commenters are also invited to discuss how we can best monitor compliance with the provisions of Section 226 of the Act, as required by Section 226(h)(3)(A)(v), for purposes of submitting the reports to Congress required by Section 226(h)(3)(B). Commenters should specifically discuss methods by which the Commission may comply with the requirement of Section 226(h)(3)(A)(v) of "periodic placement of calls from aggregator locations."[40]

C. Access and Compensation Issues

21. In our initial *NPRM*, we proposed a rule prohibiting the blocking of 10XXX access, and most parties filed detailed comments on that issue. Some parties also commented on the need for us to prescribe compensation for owners of competitive public pay telephones for calls not routed through the presubscribed OSP. While a record on these issues exists in the present proceeding, the Operator Services Act clearly directs us to conduct a "[s]eparate" rule making on access and compensation issues.[41] We therefore conclude that the access and payphone compensation issues should not be addressed in this proceeding and that the record established to date on these issues will be made a part of the later separate proceeding.

IV. PAPERWORK REDUCTION ACT

22. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. FURTHER INITIAL REGULATORY FLEXIBILITY ANALYSIS

23. **Reason for action.** The Commission is issuing this Further Notice of Proposed Rule Making to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

24. **Objectives.** The objective of this Further Notice of Proposed Rule Making is to initiate a proceeding to prescribe regulations that protect consumers from unfair and deceptive practices related to their use of operator services to place interstate telephone calls and that ensure that consumers have the opportunity to make informed choices in making such calls.

25. **Legal basis.** Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218, 226, 303(r).

26. **Description, potential impact, and number of small entities affected.** The proposed rules will require that entities in the operator services industry provide information that is necessary for consumers to make knowledgeable choices among services. The rules will also help to eliminate certain practices and charges that reduce consumer choice and competitiveness within the industry. Small entities may feel some economic impact due to the proposed information posting and reporting requirements.

27. **Reporting, recordkeeping, and other compliance requirements.** The proposed rules require reporting in the form of the disclosure by operator service providers and call aggregators to their customers of certain information regarding their identities, their services, and the options customers have in using those services. In addition, the *Further NPRM* seeks comment on whether the Commission should impose certain reporting requirements to provide information for use in the proceeding necessitated by Section 226(h)(3) of the Operator Services Act, 47 U.S.C. 226(h)(3).

28. **Federal rules which overlap, duplicate, or conflict with the Commission's proposal.** None.

29. **Any significant alternatives minimizing impact on small entities and consistent with stated objectives.** We shall consider any alternatives suggested in comments that are consistent with the requirements of the Operator Services Act.

30. **Comments are solicited.** We request written comments on this Further Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Further Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. 601, *et seq.*

VI. EX PARTE REQUIREMENTS

31. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. 1.1203.

32. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel that (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

33. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary, with a copy to the Commissioner or staff member involved, that summarizes the data and arguments. The memorandum, as well as any transmittal letter, must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. 1.1206.

34. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VII. CONCLUSION AND ORDERING CLAUSES

35. In summary, the rules proposed in this *Further NPRM* are intended, as required by the Operator Services Act, to protect consumers from unfair and deceptive practices related to their use of operator services to place interstate calls, and to ensure that consumers have the opportunity to make informed choices in placing such calls. As we noted in our initial *NPRM*, we expect the proposed rules to free consumers from charges they did not agree to and from practices that prevent them from using the operator service provider they prefer. These rules will also help foster a marketplace environment in which operator service providers compete based on the merits of their services, rather than on the payments they provide to aggregators who deliver to them a captive clientele. In submitting comments on these proposed rules, interested parties should note that we are particularly interested in evidence regarding the technical and operational complexities of implementing the proposed rules. We are also interested in the economic impact of implementation in terms of costs to or burdens on consumers, carriers, and call aggregators. In Phase II of this

docket, we seek separate comment on our proposed reporting requirements and on other issues raised by Section 226(h)(3) of the Operator Services Act.

36. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218, 226, 303(r), that a FURTHER NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing the amendment of 47 C.F.R. Parts 64 and 68 as set forth in Appendix B.

37. IT IS FURTHER ORDERED, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, that all interested parties may file comments on the matters discussed in this *Further NPRM* and on the proposed rules contained in Appendix B by January 22, 1991, and reply comments by February 6, 1991. Comments on issues designated for CC Docket No. 90-313 - Phase II are also due on these dates. Phase II comments must be filed separately from comments on other issues in this docket and must include the designation "CC Docket No. 90-313 - Phase II" in the caption of the comments. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

38. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

39. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this *Further NPRM*, including the Further Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a) (1981). The Secretary shall also cause a summary of this *Further NPRM* to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
THE TELEPHONE OPERATOR CONSUMER SERVICES IMPROVEMENT ACT OF 1990, as amended

Pub. L. No. 101-435, 104 Stat. 986 (1990)

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Operator Consumer Services Improvement Act of 1990".

SEC. 2. FINDINGS.

The Congress finds that--

(1) the divestiture of AT&T and decisions allowing open entry for competitors in the telephone marketplace produced a variety of new services and many new providers of existing telephone services;

(2) the growth of competition in the telecommunications market makes it essential to ensure that safeguards are in place to assure fairness for consumers and service providers alike;

(3) a variety of providers of operator services now compete to win contracts to provide operator services to hotels, hospitals, airports, and other aggregators of telephone business from consumers;

(4) the mere existence of a variety of service providers in the operator services marketplace is significant in making that market competitive only when consumers are able to make informed choices from among those service providers;

(5) however, often consumers have no choices in selecting a provider of operator services, and often attempts by consumers to reach their preferred long distance carrier by using a telephone billing card, credit card, or prearranged access code number are blocked;

(6) a number of State regulatory authorities have taken action to protect consumers using intrastate operator services;

(7) from January 1988 through February 1990, the Federal Communications Commission received over 4,000 complaints from consumers about operator services;

(8) those consumers have complained that they are denied access to the interexchange carrier of their choice,jthat they are deceived about the identity of the company providing operator services for their calls and the rates being charged, that they lack information on what they can do to complain about unfair treatment by an operator service provider, and that they are, accordingly, being deprived of the free choice essential to the operation of a competitive market;

(9) the Commission has testified that its actions have been insufficient to correct the problems in the operator services industry to date; and

(10) a combination of industry self-regulation and government regulation is required to ensure that competitive operator services are provided in a fair and reasonable manner.

SEC. 3. AMENDMENT.

Title II of the Communications Act of 1934 is amended by inserting immediately after section 225 (47 U.S.C. 225) the following new section:

SEC. 226. TELEPHONE OPERATOR SERVICES.

(a) *Definitions.* --As used in this section--

(1) The term 'access code' means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence.

(2) The term 'aggregator' means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.

(3) The term 'call splashing' means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

(4) The term 'consumer' means a person initiating any interstate telephone call using operator services.

(5) The term 'equal access' has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the Court in its orders issued prior to the enactment of this section.

(6) The term 'equal access code' means an access code that allows the public to obtain an equal access connection to the carrier associated with that code.

(7) The term 'operator services' means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than--

(A) automatic completion with billing to the telephone from which the call originated; or

(B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

(8) The term 'presubscribed provider of operator services' means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code.

(9) The term 'provider of operator services' means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

(b) *Requirements for Providers of Operator Services.* --

(1) In general.--Beginning not later than 90 days after the date of enactment of this section, each provider of operator services shall, at a minimum--

(A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(B) permit the consumer to terminate the telephone call at no charge before the call is connected;

(C) disclose immediately to the consumer, upon request and at no charge to the consumer--

(i) a quote of its rates or charges for the call;

(ii) the methods by which such rates or charges will be collected; and

(iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved;

(D) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of subsection (c) and, if applicable, subsection (e)(1);

(E) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator (i) is blocking access by means of "950" or "800" numbers to interstate common carriers in violation of subsection (c)(1)(B) or (ii) is blocking access to equal access codes in violation of rules the Commission may prescribe under subsection (e)(1);

(F) not bill for unanswered telephone calls in areas where equal access is available;

(G) not knowingly bill for unanswered telephone calls where equal access is not available;

(H) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates

from the actual originating location of the call, and the consumer then consents to be transferred; and

(I) except as provided in subparagraph (H), not bill for a call that does not reflect the location of the origination of the call.

(2) Additional requirements for first 3 years.--In addition to meeting the requirements of paragraph (1), during the 3-year period beginning on the date that is 90 days after the date of enactment of this section, each presubscribed provider of operator services shall identify itself audibly and distinctly to the consumer, not only as required in paragraph (1)(A), but also for a second time before connecting the call and before the consumer incurs any charge.

(c) *Requirements for Aggregators.* --

(1) In general.--Each aggregator, beginning not later than 90 days after the date of enactment of this section, shall--

(A) post on or near the telephone instrument, in plain view of consumers-- telephone number of the provider of operator services;

(ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(iii) the name and address of the enforcement division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services;

(B) ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer; and

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

(2) Effect of state law or regulation.--The requirements of paragraph (1)(A) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A).

(d) *General Rulemaking Required.* --

(1) Rulemaking proceeding.--The Commission shall conduct a rulemaking proceeding pursuant to this title to prescribe regulations to--

(A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and

(B) ensure that consumers have the opportunity to make informed choices in making such calls.

(2) Deadlines.--The Commission shall initiate the proceeding required under paragraph (1) within 60 days after the date of enactment of this section and shall prescribe regulations pursuant to the proceeding not later than 210 days after such date of enactment. Such regulations shall take effect not later than 45 days after the date the regulations are prescribed.

(3) Contents of regulations.--The regulations prescribed under this section shall--

(A) contain provisions to implement each of the requirements of this Section, other than the requirements established by the rulemaking under subsection (e) on access and compensation; and

(B) contain such other provisions as the Commission determines necessary to carry out this section and the purposes and policies of this section.

(4) Additional requirements to be implemented by regulations.--The regulations prescribed under this section shall, at a minimum--

(A) establish minimum standards for providers of operator services to use in the routing and handling of emergency telephone calls; and

(B) establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market.

(e) Separate Rulemaking on Access and Compensation.--

(1) Access.--The Commission, within 9 months after the date of enactment of this section, shall require--

(A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or

(B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or

(C) that the requirements described under both subparagraphs (A) and (B) apply.

(2) Compensation.--The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after the date of enactment of this section, the Commission shall reach a final decision on whether to prescribe such compensation.

(f) Technological Capability of Equipment.--Any equipment and software manufactured or imported more than 18 months after the date of enactment of this section and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes.

(g) Fraud.--In any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud.

(h) Determinations of Rate Compliance.--

(1) Filing of informational tariff.--

(A) In general.--Each provider of operator services shall file, within 90 days after the date of enactment of this section, and shall maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided. Any changes in such rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.

(B) Waiver authority.--The Commission may, after 4 years following the date of enactment of this section, waive the requirements of this paragraph only if--

(i) the findings and conclusions of the Commission in the final report issued under paragraph (3)(B)(iii) state that the regulatory objectives specified in subsection (d)(1) (A) and (B) have been achieved; and

(ii) the Commission determines that such waiver will not adversely affect the continued achievement of such regulatory objectives.

(2) Review of informational tariffs.--If the rates and charges filed by any provider of operator services under paragraph (1) appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to do either or both of the following:

(A) demonstrate that its rates and charges are just and reasonable, and

(B) announce that its rates are available on request at the beginning of each call.

(3) Proceeding required.--

(A) In general.--Within 60 days after the date of enactment of this section, the Commission shall initiate a proceeding to determine whether the regulatory objectives specified in subsection (d)(1) (A) and (B) are being achieved. The proceeding shall-

(i) monitor operator service rates;

(ii) determine the extent to which offerings made by providers of operator services are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market;

(iii) report on (in the aggregate and by individual provider) operator service rates, incidence of service complaints, and service offerings;

(iv) consider the effect that commissions and surcharges, billing and validation costs, and other costs of doing business have on the overall rates charged to consumers; and

(v) monitor compliance with the provisions of this section, including the periodic placement of telephone calls from aggregator locations.

(B) Reports.--(i) The Commission shall, during the pendency of such proceeding and not later than 5 months after its commencement, provide the Congress with an interim report on the Commission's activities and progress to date.

(ii) Not later than 11 months after the commencement of such proceeding, the Commission shall report to the Congress on its interim findings as a result of the proceeding.

(iii) Not later than 23 months after the commencement of such proceeding, the Commission shall submit a final report to the Congress on its findings and conclusions.

(4) Implementing regulations.--

(A) In general.--Unless the Commission makes the determination described in subparagraph (B), the Commission shall, within 180 days after submission of the report required under paragraph (3)(B)(iii), complete a rulemaking proceeding pursuant to this title to establish regulations for implementing the requirements of this title (and paragraphs (1) and (2) of this subsection) that rates and charges for operator services be just and reasonable. Such regulations shall include limitations on the amount of commissions or any other compensation given to aggregators by providers of operator service.

(B) Limitation.--The requirement of subparagraph (A) shall not apply if, on the basis of the proceeding under paragraph (3)(A), the Commission makes (and includes in the report required by paragraph (3)(B)(iii)) a factual determination that market forces are securing rates and charges that are just and reasonable, as evidenced by rate levels, costs, complaints, service quality, and other relevant factors.

(i) Statutory Construction.--Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act.

APPENDIX B
PROPOSED RULES

It is proposed that Part 64 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 64 is amended to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. § 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077, 47 U.S.C. § 201, 218, 226, unless otherwise noted.

2. A new Section 64.703 is added to read as follows:

§ 64.703 Consumer information.

(a) Each provider of operator services shall:

(1) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(2) permit the consumer to terminate the telephone call at no charge before the call is connected; and

(3) disclose immediately to the consumer, upon request and at no charge to the consumer,

(A) a quotation of its rates or charges for the call;

(B) the methods by which such rates or charges will be collected; and

(C) the methods by which complaints concerning such rates, charges, or collection practices will be resolved.

(b) Each aggregator shall post on or near the telephone instrument, in plain view of consumers:

(1) the name, address, and toll-free telephone number of the provider of operator services;

(2) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(3) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission (FCC, Enforcement Division, CCB, Room 6202, Washington, D.C. 20554), to which the consumer may direct complaints regarding operator services.

(c) *Additional requirements for first 3 years.* In addition to meeting the requirements of paragraph (a), each presubscribed provider of operator services shall, during the 3-year period beginning on the effective date of this section, identify itself audibly and distinctly to the consumer, not only as required in paragraph (a)(1), but also for a second time before connecting the call and before the consumer incurs any charge.

(d) *Effect of state law or regulation.* The requirements of paragraph (b) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (b).

(e) Each provider of operator services shall ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (b).

3. A new Section 64.704 is added to read as follows:

§ 64.704 Call blocking prohibited.

(a) Each aggregator shall ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer.

(b) Each provider of operator services shall:

(1) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (a); and

(2) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator is blocking access to interstate common carriers in violation of paragraph (a).

4. A new Section 64.705 is added to read as follows:

§ 64.705 Restrictions on charges related to the provision of operator services.

(a) A provider of operator services shall:

(1) not bill for unanswered telephone calls in areas where equal access is available;

(2) not knowingly bill for unanswered telephone calls where equal access is not available;

(3) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred;

(4) except as provided in paragraph (3), not bill for a call that does not reflect the location of the origination of the call; and

(5) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (b).

(b) An aggregator shall ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

5. A new Section 64.706 is added to read as follows:

§ 64.706 Minimum standards for the routing and handling of emergency telephone calls. Upon receipt of any emergency telephone call initiated through use of a dialing sequence associated with such calls (e.g., "0," "911") in the call's originating location, a provider of operator services shall immediately connect the call to the appropriate emergency service of the call's originating location.

6. A new Section 64.707 is added to read as follows:

§ 64.707 Public dissemination of information by providers of operator services. Providers of operator services shall regularly publish and make available at no cost to inquiring consumers written materials that describe any recent changes in operator services and in the choices available to consumers in that market.

7. A new Section 64.708 is added to read as follows:

§ 64.708 Definitions. As used in sections 64.703 through 64.707 and 68.318, 47 C.F.R. § 64.703-64.707, 68.318:

(a) the term "access code" means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence;

(b) the term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services;

(c) the term "call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location;

(d) the term "consumer" means a person initiating any interstate telephone call using operator services;

(e) the term "equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered by the United States District Court on August 24, 1982, in *United States v. Western Electric*, Civil Action No. 82-0192 (D.D.C. 1982), as amended by the Court in its orders issued prior to the effective date of this section;

(f) the term "equal access code" means an access code that allows the public to obtain an equal access connection to the carrier associated with that code;

(g) the term "operator services" means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than:

(1) automatic completion with billing to the telephone from which the call originated; or

(2) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer;

(h) the term "presubscribed provider of operator services" means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code;

(i) the term "provider of operator services" means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

It is proposed that Part 68 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 68 is amended to read as follows:

Authority: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, 48 Stat., as amended, 1066, 1070, 1071, 1072, 1073, 1076, 1077, 1087, 1094, 1098, 1102, 47 U.S.C. § 154, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, unless otherwise noted.

2. Section 68.318 is amended by adding paragraph (d) to read as follows:

§ 68.318 Additional limitations.

*****

(d) *Requirement that registered equipment allow access to common carriers.* Any equipment or software manufactured or imported on or after April 17, 1992, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes. The terms used in this paragraph shall have the meanings defined in Section 64.708, 47 C.F.R. 64.708.

FOOTNOTES

[1] Pub. L. No. 101-435, 104 Stat. 986 (1990) (to be codified at 47 U.S.C. § 226) ("Operator Services Act"). The text of the Act is attached as Appendix A.

[2] S. Rep. No. 101-439, 101st Cong., 2d Sess. 1 (1990); *see also* H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 2 (1989) ("The purpose of [the Act] is to protect telephone consumers against

unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.").

[3] 47 U.S.C. § 226(d), (h)(3)

[4] *Id.* § 226(d)(2), (h)(3)(A).

[5] Policies and Rules Concerning Operator Service Providers, Notice of Proposed Rule Making, 5 FCC Rcd 4630 (1990) (hereinafter *NPRM*).

[6] *See* 47 U.S.C. § 226(h)(3)(A).

[7] *See id.* § 226(e).

[8] *NPRM,* 5 FCC Rcd at 4630. A full discussion of the development of the operator services industry and the proceedings related to operator service issues is contained in the *NPRM. See id.* at 4630-31.

[9] *See* 47 U.S.C. § 226(a)(2).

[10] An access code is a sequence of numbers that, when dialed, connects the caller to the OSP associated with that sequence. *See id.* § 226(a)(1).

[11] *NPRM,* 5 FCC Rcd at 4630.

[12] Telecommunications Research & Action Center v. Central Corp., 4 FCC Rcd 2157 (Com. Car. Bur. 1989) (hereinafter *TRAC Order*), *application for review pending.*

[13] *Id.* at 2159; *see also id.* at 2160 nn.5-6 (definitions of "call blocking" and "call splashing").

[14] *See* Petition of the National Association of Regulatory Utility Commissioners, RM-6767 (filed April 17, 1989) (hereinafter "NARUC Petition").

[15] *NPRM,* 5 FCC Rcd at 4631 (also denying the petition in part).

[16] *Id.* at 4631-35, 4637-38.

[17] *Id.* at 4632-35 (these issues included double branding, charging for unanswered or uncompleted calls, and standards for the handling of emergency calls).

[18] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Order, DA 90-1383 (released Oct. 5, 1990) (deadline for filing reply comments extended to Oct. 23, 1990).

[19] Public Notice, DA 90-1773 (released Dec. 4, 1990).

[20] *See* 47 U.S.C. § 226(a)(7), (9), (h)(1)(A).

[21] Many commenting parties have expressed a preference for additional Commission action beyond our initial *NPRM.* For example, some parties have suggested that a fuller record on certain issues must be developed. *See, e.g.,* Reply Comments of BellSouth Tel. Cos. (further rule making necessary for establishment of emergency call standards). Other parties have indicated that clarification is necessary for certain statutory requirements. *See, e.g.,* Reply Comments of The American Public Communications Council (branding, information posting).

[22] 47 U.S.C. 226(d).

[23] The Act requires that, by May 15, 1991, the Commission adopt the general regulations prescribed under Section 226(d)(2). These regulations must take effect by June 29, 1991. *Id.*

[24] Appendix B contains the text of the new proposed rules.

[25] Appendix B, 64.703(c). "Branding" occurs when an operator service provider audibly identifies itself to a caller before the call is connected. 47 U.S.C. 226(b)(1)(A); *NPRM,* 5 FCC Rcd at 4630. We have tentatively defined "double branding" as such an identification both at the beginning of a call and again just before the call is connected. *NPRM,* 5 FCC Rcd at 4632.

[26] Appendix B, § 64.703(b)(3).

[27] *Id.* § 64.705(a)(1)-(2).

[28] *Id.* § 64.705(b).

[29] *Id.* § 64.704.

[30] The Act requires 800 and 950 blocking to be addressed in this proceeding and the 10XXX blocking issue to be addressed in a separate proceeding. 47 U.S.C. § 226(d)(3)(A), (e); *see also* para. 21, *infra.*

[31] Appendix B, § 68.318(d).

[32] *Id.* § 64.708.

[33] *Id.* § 64.705(a)(3)-(4).

[34] 47 U.S.C. § 226(d)(4)(A).

[35] *Id.* § 226(d)(4)(B).

[36] *NPRM,* 5 FCC Rcd at 4634-35.

[37] U.S.C. § 226(d)(1)(B).

[38] Comments on the matters contained in Section 226(h)(3) of the Act must be filed separately from those on other issues in this proceeding and must be designated, in the caption, "CC Docket No. 90-313 -- Phase II."

[39] Section 226(h)(3)(A)(iii) also directs us to report on service offerings. We expect to glean the information necessary for such reports from the tariffs that must be filed under Section 226(h)(1). Comments on improvements in service, which we have solicited *infra,* may also contain helpful information in this regard.

[40] *See NPRM,* 5 FCC Rcd at 4639 n.28.

[41] 47 U.S.C. § 226(e); *see also id.* 226(d)(3)(A) (the regulations prescribed in the "general" rule making shall implement the provisions of the Act "other than the requirements established by the rule making under subsection (e) on access and compensation"). Section 226(e) states that the Commission must make two determinations in the separate rule making. First, we must decide whether (a) aggregators must unblock 10XXX access; (b) OSPs must establish 800 or 950 access; or (c) both (a) and (b). Second, we must decide whether to prescribe compensation for owners of competitive public payphones for calls not routed through their presubscribed OSPs. The Act requires the Commission to make determinations regarding the access and compensation issues within 9 months of the statute's enactment, i.e., by July 17, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

For Construction Permit
Secaucus, New Jersey

Appearances

James R. Denvir, Esq., Randall L. Sarosdy, Esq., Elizabeth Haile Hayes, Esq., Michael R. Gardner, Esq., and *Charles R. Milkis, Esq.*, on behalf of WWOR-TV, Inc.; *Lewis I. Cohen, Esq., Morton L. Berfield, Esq.* and *Roy W. Boyce, Esq.* on behalf of Garden State Broadcasting Limited Partnership; and *Charles E. Dziedzic, Esq., Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

PARTIAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: January 4, 1991; Released: January 11, 1991

PRELIMINARY STATEMENT

1. This case was commenced under *Hearing Designation Order* DA 88-1077, published at 53 Fed. Reg. 28911 (August 1, 1988) for the renewal of the broadcast license of Station WWOR-TV (Channel 9) held by WWOR-TV, Inc. ("WWOR-TV"), and the competing application of Garden State Broadcasting Limited Partnership ("Garden State") for a construction permit for a television station on Channel 9 in Secaucus, New Jersey.[1]

2. This case is in a decisional posture at this time because of a proposed settlement that was submitted to the Presiding Judge on September 27, 1990. The proposed settlement was filed two days after WWOR-TV's parent company, MCA, Inc. ("MCA"), issued a news release announcing discussions regarding a negotiated acquisition of MCA. (WWOR Exh. 21-A.) In a Declaration that accompanied the settlement papers, Ms. Wells certified that the application of Garden State was not filed for the purpose of reaching or carrying out the settlement agreement. (WWOR Exh. 21-B.) The settlement was opposed by the Mass Media Bureau ("Bureau") and was denied because the agreement contemplated a monetary payoff to Garden State in the amount of $2 million while there remained an unresolved added issue against Garden State that could preclude approval of a settlement. The added issue was set:

> [t]o determine the facts and circumstances of the motive and the *bona fides* of the filing of Garden State Broadcasting Limited Partnership's application, whether those facts and circumstances show that the application of Garden State Broadcasting Limited Partnership was filed for the purpose of reaching or carrying out a settlement agreement which would result in the dismissal of its application, thereby abusing the Commission's process, whether Garden State Broadcasting Limited Partnership has misrepresented or lacked candor in certifying that it did not file its application for an improper motive and lack of good faith, and the impact thereof on the basic qualifications of Garden State Broadcasting Limited Partnership to be a Commission licensee.

Memorandum Opinion and Order, FCC 88M-3567, released October 25, 1988.

3. That issue was added at the request of WWOR-TV, concurred in by the Bureau, and the Presiding Judge's ruling adding the issue was affirmed by the Review Board. *See WWOR - TV, Inc.*, 3 F.C.C. Rcd 7175 (Review Bd 1988). There had been no motion filed to resolve the issue by summary decision. *See* 47 C.F.R. §1.251. Therefore, a hearing was required in view of the statutory prohibition against approving a settlement involving an application that was filed for the purpose of securing a settlement. The proposed settlement was denied with the right to renew its consideration if the disqualifying added issue is resolved in favor of Garden State. *See Memorandum Opinion and Order*, FCC 90M-3220, released October 12, 1990. The Presiding Judge also ruled that he would consider whether the evidence would support summary grant of WWOR- TV's renewal application and whether Garden State's application should be dismissed with prejudice without approval of the proposed settlement. *Id.*

4. A provision of the proposed Settlement was also rejected that contained a covenant which would prohibit Jean Wells and Garden State from filing before April 21, 1998, any "petition, motion, complaint or other pleading that relates to the broadcast license of station WWOR-TV." *Id.* The Bureau has asserted that the covenant was too restrictive and the Commission has held it to be contrary to the public interest to preclude the future filing of applications that might improve service to the public. *James S. Rivers, Inc.*, 26 F.C.C. 4 (Comm'n 1959).

5. In accordance with scheduling proposed by counsel, hearings were set for October 19, 1990, and October 24-26, 1990 (FCC 90M-3257). The Commission adopted its ruling on documents claimed by Jean Wells to be privileged (FCC 90-345) and the Presiding Judge set a schedule for delivery of documents to counsel for WWOR-TV and counsel for the Bureau (FCC 90M-3258). A related protective order was issued by the Presiding Judge on October 18, 1990 (FCC 90M-3292). A joint motion to suspend cross examination of public witnesses was issued on October 17, 1990 (FCC 90M-3307), a mo-

tion to defer the examination of Jean Wells was granted for cause that same day (FCC 90M-3320), rulings on witness sequestration were confirmed on October 19, 1990 (FCC 90M-3340), and the Presiding Judge denied a petition for leave to intervene on October 26, 1990 (FCC 90M-3406).

6. Hearings were conducted in Washington, D.C. on October 19, 24, 25, and 29, 1990. The burden of proceeding with the introduction of evidence continued to be assigned to WWOR-TV, although it requested to be relieved of that burden (Tr. 1008-16), and the burden of proof was assigned to Garden State. The testimony of the following persons was taken, with full rights of cross-examination afforded the parties:

Robert D. Hadl	Vice President and General Counsel, MCA, Inc. and Vice President, WWOR-TV, Inc.
Morton L. Berfield	Partner, Cohen and Berfield, P.C.
Lewis I. Cohen	Partner, Cohen and Berfield, P.C.
Jean Wells	General Partner, Mainstream Television Limited Partnership and Garden State Broadcasting Limited Partnership.

WWOR-TV introduced 72 exhibits, Garden State introduced 21 exhibits, and the Bureau introduced six exhibits. The parties were ordered to file Proposed Findings of Fact and Conclusions of Law by December 13, 1990, and any Proposed Reply Findings and Conclusions were required to be filed by December 21, 1990 (FCC 90M-3456). All parties filed their Proposed Findings and Conclusions on December 13, 1990, and Garden State filed its proposed Reply Findings and Conclusions on December 20, 1990.

7. This partial decision will address only the added issue and the proposed settlement in accordance with the Commission's standards at 47 C.F.R. §1.267(b). This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C. §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *SEC*, 450 U.S. 91 (1981). Testimony is cited where practicable by the name of the witness followed by the transcript page number. References to proposed findings and conclusions are introduced by "PFC."

FINDINGS OF FACT

The Parties' Present Positions on Settlement

8. WWOR-TV has found the challenge to its renewal application to be a material distraction to station management because full resources could not be devoted to broadcast operations.[2] Therefore, MCA determined that it would be desirable to settle the litigation on terms it deemed reasonable so that it would not need to direct its resources and senior personnel to an upcoming hearing that would be costly and lengthy. (WWOR Exh. 21.)[3]

9. Ms. Jean Wells, the general partner of Garden State, has started a new business with substantial demands on her time. The new business would suffer if Ms. Wells participates further in the litigation of this case and therefore it is in her best interest to settle. (Garden State Exh. 1.)

The Mainstream Venture

10. On March 31, 1986, Mainstream Television Limited Partnership ("Mainstream") tendered an application for a construction permit for a new TV station on Channel 9 in Secaucus, New Jersey. (Garden State PFC at 3.) Mainstream also filed simultaneously a petition requesting that the then licensee, RKO General, Inc. ("RKO"), be required to file an early renewal application and that Mainstream's application be accepted and processed simultaneously with RKO's renewal application. (WWOR Exh. 27.) At that time, Ms. Wells was the sole general manager of Mainstream with a 3.75% equity interest.

11. Mainstream's genesis was the RKO qualifications proceeding involving 13 broadcast licenses in which Mr. Berfield participated as counsel. As that proceeding progressed, Mr. Berfield formed an opinion as litigating counsel for a challenging group that RKO would have serious problems in obtaining renewals and that with the proper filings, an early renewal proceeding might be set by the Commission. (Berfield, Tr. 1204-05.) Mr. Berfield relayed this conclusion to his law partner, Mr. Cohen, in late 1985 or early 1986. Then Mr. Cohen took the lead, and said that he knew someone who might be interested in an RKO challenge. He contacted Mr. Richard Rynd ("Rynd").

12. Mr. Rynd organized the limited partners (Cohen, Tr. 1327); but he told Mr. Cohen that he knew of no one who would be a good general manager. (Cohen, Tr. 1328.) Mr. Cohen contacted a client unrelated to Mainstream or Garden State, Mr. Robert Lee Dunham, and Mr. Dunham put Mr. Cohen in touch with Ms. Wells. (Cohen, Tr. 1328-30.)

13. Mr. Rynd was said to be a business risk-taker:

> He had said to me that he was interested in broadcast projects where there was a high risk/reward ratio, and he was willing to take risks for great rewards.

(Cohen, Tr. 1325.) Mr. Cohen recommended going forward with a challenge to the license for then Station WOR but it was Mr. Rynd who selected the partnership vehicle and the limited partners from among his friends and relatives:

> It was soon apparent to me that Mr. Rynd, when he expressed interest in the project, said that he would bring into this friends and relatives, so when I am using the word "Mr. Rynd," I am talking about Rynd et al., to wit, the people who were his friends and relatives.

(Cohen, Tr. 1326.) Mr. Cohen obtained Ms. Jean Wells' resume', sent it to Mr. Rynd on January 24, 1986, and met with Ms. Wells to "interview" her on February 4, 1986. (WWOR Exh. 22.) Prior to their meeting, Ms. Wells prepared her resume' which she sent to Mr. Cohen and which he forwarded to Mr. Rynd and three other limited partners, Melvin A. Steinberg, William K. Orlove, and Stanley J. Orlove. (Wells, Tr. 1692; WWOR Exh. 22.)

14. Mr. Cohen could not remember whether he met with Mr. Rynd to discuss Ms. Wells before Mr. Cohen went to New York to interview her. (Cohen, Tr 1331.) But the testimonial evidence is clear. Mr. Rynd wanted Mr. Cohen to clear Ms. Wells before she was approached for the position of general partner. Mr. Cohen testified:

> He asked me to go to New York and talk to her to see whether I thought she would be a good general partner, because he said to me, I had, in his view, an understanding of what kind of requirements from an FCC point-of-view would be desirable in a general partner. So he asked me to preliminarily, if you will, talk to her prior to the time he and the limited partners would decide to talk to her.

(Cohen, Tr. 1332.) Ms. Wells was the only candidate for general partner who was interviewed by Mr. Cohen and there is no evidence that any other candidate was considered for the position. (Cohen, Tr. 1331.)

15. Ms. Wells is an Afro-American female. She resides in Teaneck, New Jersey. (Wells, Tr. 1670.) She now is one-third owner and president of Wells, Burns & Watkins, a firm in Brooklyn, New York, organized in October 1989, and conducting business in advertising, promotions and special events. (Wells, Tr. 1678-79, 1682-83.) In May 1989, Ms. Wells left her position at Inner City Broadcasting Corp., a licensee of several broadcast stations, where she had worked in several positions. She had served as general sales manager of one of the company's radio broadcast stations in New York City, Station WLIB(AM). (Wells, Tr. 1678-80, 1688, 1807-08.)

16. At his meeting with Ms. Wells, Mr. Cohen told her that he was representing a group of investors that wanted to challenge WOR-TV's license. He told her something about the legal issues involved but he was mainly concerned about learning from Ms. Wells her broadcast experience and her knowledge of the community that might be helpful in the challenge. (Cohen, Tr. 1333 and Wells, Tr. 1692-93.) At that time, Ms. Wells had never prepared a budget for a TV station, was unfamiliar with Commission procedure, had never participated in a Commission proceeding, had no news experience, had never managed a staff of more than seven or eight, and had no knowledge of the number of persons employed at WOR-TV. (Wells, Tr. 1811-12.)

17. Ms. Wells did have experience in radio broadcasting but did not have any experience in television broadcasting. (Cohen, at 1333-34; Wells, Tr. 1811-13.) Mr. Cohen told Ms. Wells that if she were selected as Mainstream's general partner, she would receive a percentage of the partnership interest in exchange for her services. (Cohen, Tr. at 1339; Wells, Tr. 1700.) Following the meeting, Mr. Cohen recommended to Mr. Rynd that Ms. Wells be the general partner for Mainstream. (Cohen, Tr. 1335.) Ms. Wells later contacted Mr. Cohen and expressed her interest in the position. (Cohen, Tr. 1334-35; Wells, Tr. 1699.) Shortly thereafter, Mr. Rynd, Ms. Wells and Mr. Cohen met in New York City. (Cohen, Tr. 1337-38; Wells, Tr. 1708-10.) During that meeting Mr. Rynd suggested giving Ms. Wells a 3.75% interest in the limited partnership in exchange for her services. (Cohen, Tr. at 1339-40.) If Mainstream were successful in its application for Channel 9, Ms. Wells was to become general manager of the station with compensation at a rate to be determined at such time as she assumed this position. (Cohen, Tr. 1351-52; Wells, Tr. 1810; WWOR Exh. 25.)

18. There was a subsequent meeting between Cohen, Wells and Rynd in New York City at which Mr. Rynd advised that the limited partners would accept Ms. Wells as Mainstream's general partner with a 3.75% equity interest. (Cohen, Tr. 1336-38, 1340.) Although no salary was negotiated or agreed to for Ms. Wells' services, Mr. Cohen designed a "formula" that would be a proxy for a survey of prevailing salaries. (Cohen, Tr. 1352-53.)

19. Mr. Cohen reserved the Mainstream name with New Jersey's Secretary of State and Mr. Rynd obtained a financial commitment for construction costs. (Cohen, Tr. 1341, 1359.) While Mainstream was being organized, Mr. Cohen and Ms. Wells were not aware that RKO intended to transfer its license for Channel 9 to MCA. (Cohen, Tr. 1366, 1370-71; Wells, Tr. 1843.) It was after Mainstream's formation, but before Mainstream's application was filed, that Mr. Cohen and Ms. Wells learned about the proposed sale and assignment of Channel 9 from RKO to MCA. (Cohen, Tr. 1366; Wells, Tr. 1843.)

20. A Mainstream retainer letter agreement was prepared by Mr. Cohen and executed on or about March 12, 1986. (WWOR Exh. 26.) The Cohen & Berfield firm's fees were negotiated with Mr. Rynd and Mainstream was not to be billed on an hourly basis. (Cohen, Tr. 1356-58.) Under the agreement, Cohen & Berfield P.C. would be awarded a 10% bonus upon dissolution of the partnership, net of capital contributions and partnership debt, that would be in addition to fees for services.[4]

21. The bonus provision was drafted by Mr. Cohen with a settlement contingency in mind, and the retainer was not questioned by Ms. Wells or the limited partners. (Cohen, Tr. 1353-56.) But there is no substantial evidence that proves that Cohen, Wells and Rynd had agreed on a plan or scheme to file Mainstream's application in order to effect settlement. After Mr. Cohen received the signed retainer agreement, he and his law firm proceeded to prepare an FCC application Form 301, a petition to invoke early renewal of the WOR-TV licensee, and documents associated with a budget and a bank letter. (Cohen, Tr. 1359.)

22. Mr. Cohen took the lead on budget preparation because Ms. Wells had no experience in preparing TV budgets. (Cohen, Tr. 1361; Wells, Tr. 1714-15.) He suggested Rav M. Stanfield ("Stanfield") of Granada Hills, California and she accepted the recommendation. Mr. Cohen and Ms. Wells traveled to Granada Hills to meet with Mr. Stanfield. (Cohen, Tr. 1363.) A budget covering construction and operation costs was prepared by Stanfield, Cohen and Wells, but none of these persons was able to produce a document. (Cohen, Tr. 1389.)

23. With permission from Ms. Wells, Mr. Cohen took the lead in lining up Dr. Roger Johnson ("Johnson") as an expert witness[5] in April 1986. (Cohen, Tr. 1379.) Mr. Cohen met with Dr. Johnson on April 17, 1986, and although Ms. Wells did not attend the meeting, she was in contact with Dr. Johnson by telephone. (Cohen, Tr. 1383; Wells, Tr. 1713-14.) However, it never became necessary to use Dr. Johnson's services for Mainstream beyond these initial contacts.

24. On June 4, 1986, RKO filed its application for consent to the assignment of license for WOR-TV to a wholly owned subsidiary of MCA and on July 14, 1986, Mainstream filed a petition to deny the assignment application.

25. On December 9, 1986, the Commission issued a decision granting the assignment of RKO's license to MCA, denying a petition filed by Mainstream to deny the assignment, and refusing to accept Mainstream's application. *RKO General, Inc. (WOR - TV),* 1 F.C.C. Rcd 1081 (1986).[6] Mainstream filed an appeal with the United States Court of Appeals for the District of Columbia Circuit and a Motion To Stay the *WOR - TV* decision. (Cohen, Tr. 1390.) The motion for stay was denied by the Court. (*Id.*) Mr. Cohen had concluded that while he believed in the merits of Mainstream's appeal, its success was speculative and he testified that he shared his opinion in that regard with Ms. Wells. (Cohen, Tr. 1392-93.)

26. The next event in evidence is testimony of a contact that was initiated by counsel for RKO about settlement. The contact occurred in January or February 1987. (Berfield, Tr. 1221-22.) At a lunch meeting between Mr. Berfield and RKO's counsel, RKO offered $1 million to settle by dismissal of Mainstream's court appeal. Mr. Berfield immediately transmitted the offer to his partner, Mr. Cohen. (Berfield, Tr. 1223.) Mr. Cohen contacted Ms. Wells about the settlement offer and told her that "this is something that she ought to think very hard about." (Cohen, Tr. 1394-95; Wells, Tr. 1727.) Mr. Cohen communicated substantially the same message and advice to two of the limited partners, Mr. Rynd and Mr. Steinberg.[7] (Cohen, Tr. 1395.)

27. Messrs. Cohen, Berfield, Rynd and Steinberg and Ms. Wells met in Mr. Cohen's office to discuss settlement. (Cohen, Tr. 1397-99; Wells, Tr. 1726-28.) The group agreed that Mainstream would settle for a payment of $11.5 million. That amount represented Ms. Wells' assessment of adequate monetary compensation for her lost opportunity to challenge Channel 9's licensee. (Cohen, Tr. 1401; Wells, 1727, 1730-32.) There was no specific methodology used by Ms. Wells to assess her value of the lost opportunity. One factor considered was her share of an $11.5 million settlement calculated to be $400,000. (Wells, Tr. 1730-32, 1825.) The assertion that there is a "lost opportunity" value of $11.5 million or of $400,000 for the opportunity to challenge Channel 9's licensee is rejected for lack of any credible evidence.

28. On March 2, 1987, the same three Mainstream principles and Mr. Cohen met with RKO's counsel and RKO's Chairman to pursue settlement discussions. (Cohen, Tr. 1401-02; Wells, 1727-29; WWOR Exh. 32.) Ms. Wells negotiated with RKO's Chairman, an offer of $5.37 million was made by RKO, and Ms. Wells discussed the offer with Mr. Rynd and Mr. Steinberg, who agreed to accept that amount. (Cohen, Tr. 1401, 1409; Wells, Tr. 1728-29.)

29. The Mainstream settlement was contingent on settlement of other appeals of RKO's transfer to MCA. All appeals of the FCC's decision to authorize the transfer were settled by March 25, 1987. (WWOR Exh. 33.) On April 1, 1987, Mainstream received payment of $5.37 million. (WWOR Exhs. 34, 38.) Mr. Berfield calculated distribution amounts and prepared the checks for Ms. Wells to sign. (Berfield, Tr. 1237; Cohen, 1412; WWOR Exhs. 41, 42.) Ms. Wells received a share in the amount of $178,694 (WWOR Exh. 63) and the Cohen & Berfield law firm was paid the sum of $528,500, an amount calculated at 10% of the settlement, the bonus percentage under the retainer. (Cohen, Tr. 1421; WWOR Exh. 42.) Mr. Cohen arranged for an accountant to prepare partnership tax returns, Ms. Wells' Form K-1, and to provide documentation to limited partners for their individual income tax returns. (Cohen, Tr. 1417, 1543.) Mr. Sidney Fetner, who would play a major role in the Garden State application and who was Mr. Rynd's cousin, received a *pro rate* share in the amount of $1.3 million on an investment of $21,428. (Cohen, Tr. 1345; WWOR Exh. 42.)

30. MCA began operating on Channel 9 on April 3. 1987. (Cohen, Tr. 1432; Wells, 1832.) It was on or about August 11, 1987, that Mr. Berfield made the final Mainstream distribution. (Berfield, Tr. 1240; WWOR Exh. 48.)

The Garden State Venture

31. Mr. Fetner had no experience in broadcasting aside from his investment in Mainstream. Mr. Fetner rejected the idea of purchasing a broadcast property through a brokered purchase. But at the conclusion of the Mainstream settlement, he reminded Mr. Cohen that he had considerable financial resources and that he was interested in speculating with money where there was the potential for a substantial reward.

> Mr. Cohen: [H]is buying a television station, to him, wasn't what he was looking for. He said he owned lots of businesses.
>
> Q: What was he looking for?
>
> A: He liked the challenge and the chase.

(Cohen, Tr. 1425.) He wanted Mr. Cohen to advise him of any such opportunities in broadcasting. (*Id.*) He had this and similar conversations with Mr. Cohen around the time of the Mainstream settlement on or about March 2, 1987. (Cohen, Tr. 1426.)

32. Sometime between April 15, 1987, and July 16, 1987, in a telephone conversation between Ms. Wells and Mr. Cohen, she expressed personal criticism of the news and entertainment programming of WWOR-TV as being, in her view, the same programming that RKO had provided which she believed was not responsive to the needs of Northern New Jersey. (Cohen, Tr. 1429, 1735- 38; Garden State's PFC at 5.) Mr. Cohen testified that Ms. Wells knew that Channel 9 was soon to file a renewal application. But Ms. Wells testified that she became aware of the imminent license renewal from Mr. Cohen in a subsequent telephone call in the Summer of 1987. (Cohen, Tr. 1531; Wells, Tr. 1836.) Mr. Cohen also testified that in April 1987, he had filed an application for Ms. Wells in another broadcast venture in Poughkeepsie, New York. (Cohen, Tr. 1431.) That would be an occasion to speak with Ms. Wells about the programming of WWOR-TV. Mr. Cohen also testified that after the Mainstream settlement, Ms. Wells told him that she was aware that MCA (WWOR-TV) had to file a renewal application and that a new entity such as Garden State would have an absolute right to be compared, which was not the situation earlier when RKO held the license. (Cohen, Tr. 1531.) If she knew about renewal she most likely had learned of it earlier from Mr. Cohen or from Mr. Berfield. Certainly, the occasion to speak was presented in light of the Poughkeepsie application, and sometime be-

fore Ms. Wells initiated a conversation about renewal she most likely had learned of it from Mr. Cohen, her communications counsel. While the testimony of the persons who were involved in those conversations is inconclusive for determining the month in which they took place, it was before July 16, 1987, the date when all of the limited partners were accounted for. (WWOR Exh. 45.)

33. At Mr. Cohen's request, Ms. Wells agreed that Mr. Cohen could pass this information about Ms. Wells' criticisms of Channel 9 programming to one of Mr. Cohen's clients. (Cohen, Tr. 1431, 1437; Wells, Tr. 1737-40.) In keeping with the desires of Mr. Fetner, Mr. Cohen relayed the information to Mr. Fetner, the limited partner of Mainstream. (Cohen, Tr. 1434; WWOR Exh. 25.) Mr. Fetner stated that he wanted a meeting and Mr. Cohen arranged one in New York City among Mr. Fetner, Mrs. Fetner, Ms. Wells and Mr. Cohen. (Cohen, Tr. 1434, 1440-41; Wells, Tr. 1740.)

34. The date of the meeting was not established by the evidence.[8] The purpose for the meeting was to determine whether Ms. Wells and Mr. Fetner would be compatible business partners in a venture to challenge Channel 9's renewal. (Cohen, Tr. 1444-45.) But Mr. Cohen testified that there was no discussion during the dinner meeting about filing a renewal challenge against MCA for the purpose of reaching a settlement. (Cohen, Tr. 1446.) Similarly, Mr. Cohen testified that there was no discussion during the dinner meeting about the settlement proceeds that Ms. Wells, Mr. Fetner and the other Mainstream partners had received earlier that year in their settlement with the previous licensee of Channel 9. (Cohen, Tr. 1447.) That may well have been the case. But since Mr. Cohen, Mr. Fetner and Ms. Wells had recently settled a renewal challenge for $5.7 million it did not need to be communicated in *haec verba* that an offer for a financially profitable settlement could be made by MCA, assuming that a non-frivolous challenge were made. In addition, it also would be reasonable to assume that the subject of a potential lawsuit by MCA based on a theory of breach of the Mainstream agreement would be a topic of discussion. Yet that was never mentioned in the testimony.[9]

35. Mr. Fetner offered Ms. Wells a 4% interest in a limited partnership to challenge the licensee, WWOR-TV. (Cohen, Tr. 1448-49; Wells Tr. 1740-43.) Mr. Fetner volunteered to put up or arrange for the capital and he offered Ms. Wells a 4% equity interest in exchange for her services as general partner. (Cohen, Tr. 1449; Wells, Tr. 1741, 1743.) Ms. Wells took the offer under advisement and within a few days she accepted Mr. Fetner's proposition. (Wells, Tr. 1746).

36. By July 16, 1987, all of the limited partners for the Garden State venture had been identified. (WWOR Exh. 45.) Mr. Fetner selected all of the limited partners, who were his family and friends, and Ms. Wells selected the name of the partnership. (Cohen, Tr. 1452-54; Wells Tr. 1743.) Thus, a documented decision to form Garden State as a limited partnership and to proceed with the challenge to WWOR-TV's license had been made as of July 23, 1987. (Cohen, Tr. 1485; WWOR Exh. 46.) Also on that date, Mr. Fetner paid the Cohen & Berfield law firm a retainer in the amount of $25,000. (Cohen, Tr. 1455-58, WWOR Exh. 46.) The required limited partnership agreement and certificate were filed with the State of Delaware on October 19, 1987. (WWOR Exh. 58.) Mr. Fetner died in April 1988. (Cohen, Tr. 1560-61.)

The Garden State Retainer Agreement

37. Mr. Cohen was the principal author of the Garden State retainer agreement and he discussed it outside of his firm only with Mr. Fetner. (Cohen, Tr. 1499.) On August 2, 1987, the retainer agreement and the limited partnership agreement were sent to the limited partners for signature. (Cohen, Tr. 1495; WWOR Exh. 51.) The retainer agreement provides for a 10% bonus for Cohen & Berfield in the event the partnership dissolves or settles the litigation. (Cohen, Tr. 1497; WWOR Exh. 52.) Unlike the Mainstream arrangement, the retainer agreement also provides for a bonus, unspecified as to amount or percentage, that would be based on the value of the station in the event that Garden State were successful in obtaining the permit. (Cohen, Tr. 1501-02; WWOR Exh. 52.) The capital contributions also varied: Mainstream called for total capital contributions of $249,000 (WWOR Exh. 26) while Garden State called for contributions of $500,000. (WWOR Exh. 52.)

38. As to the differences in the retainer agreements, Mr. Berfield said that the unspecified bonus, should Garden State win, was an unknown amount that could not be quantified because the station's value was then unknown. (Berfield, Tr. 1261.) Mr. Cohen relied on his perception of Mr. Fetner's sense of fairness to see to a suitable reward if Garden State was declared the winner. (Cohen, Tr. 1503.) The authorized capital of $500,000 was based on Mr. Cohen's estimate of the duration of the litigation. (Cohen, Tr. 1500-02.) Ms. Wells did not know why the capital contribution of Garden State differed from that of Mainstream. (Wells, Tr. 1745.)

39. Before any partner could sell or transfer any portion of a capital interest it was necessary to obtain the written consent of the general partner and the general partner's attorney. (WWOR Exh. 58 at 10.) Mr. Cohen was unable to state a reason for requiring the consent of the general partner's attorney. He considered himself and his firm to represent the limited partnership - the entity - and not its general partner, Jean Wells. (Cohen, Tr. 1517.) But Ms. Wells did in fact look to Cohen & Berfield for legal advice on matters that related to her position as general partner of Garden State. (Cohen, Tr. 1517-18.) And Ms. Wells confirmed that she consulted Mr. Cohen on most matters involving Garden State and that she could recall no situation where she went against his advice. (Wells, Tr. 1853-54.) The evidence establishes the fact that Mr. Cohen represented the Garden State limited partnership entity and Ms. Wells in her capacity of its general partner. But there is no evidence of a conflict ever arising in those representations.

Prosecution Of Garden State's Application

40. Sometime before October 1, 1987, Ms. Wells and Mr. Cohen returned to California to work with Mr. Stanfield on a budget for Garden State. (Wells, Tr. 1752-54.) Mr. Stanfield prepared a budget. (Cohen, Tr. 1557; WWOR Exh. 88.) Under Mr. Cohen's advice, Ms. Wells set up a partnership checking account and obtained the requisite IRS number. Mr. Cohen's law firm handled the initial capital call paperwork because Ms. Wells was not logistically set up to handle it. But it appears that she handled subsequent calls. (Cohen, Tr. 1532-33.)

41. On December 21, 1987, MCA filed its application for renewal of the license for WWOR-TV and two days later, on December 23, 1987, Garden State filed its com-

peting application. (WWOR Exh. 62.) For tactical reasons, Garden State filed quickly in order to restrict the record on which WWOR-TV could urge a renewal expectancy. (Cohen, Tr. 1535-37.) Ms. Wells admitted knowing when the application was filed that comparative renewal cases could result in lucrative settlements as evidenced by her participation in Mainstream. But she testified that such circumstance played no role in her decision to file the Garden State application. (Wells, Tr. 1837-38.) While there is no item of substantial evidence in the record to rebut that position and there is no evidentiary basis to reject her testimony, the inference is made by the undersigned fact finder that Ms. Wells had in mind the possibility that even if Garden State did not receive a construction contract, there might be an alternative financial benefit obtained through settlement. But the totality of the evidence shows that the application was filed on December 23, 1987, for the purpose of obtaining a construction permit and that evidence fails to establish that Garden State filed for the purpose of securing a settlement.

42. Ms. Wells performed identifiable services for Garden State. She prepared a draft annual report and she hired a person to assist her in locating public witnesses. (Cohen, Tr. 1554; WWOR Exhs. 65 and 66; Wells, Tr. 1850.) She also monitored Dr. Johnson's progress in the preparation of his expected testimony on programming. (Garden State Exhs. 6 and 7.) Two meetings between Ms. Wells, Dr. Johnson and Mr. Cohen were held in July 1988, and Dr. Johnson submitted his 96 page draft report in November - December 1988. (Garden State Exh. 7 at 2 - 3.)

43. Garden State paid Dr. Johnson the sum of $19,066 for his efforts on a draft report that was intended to show that WWOR-TV programming was not responsive to the needs of Northern New Jersey. In addition, through Ms. Wells' efforts, Garden State hired Journal Graphics, Inc. to transcribe tapes of WWOR-TV's programming that had been made by Dr. Johnson, and to perform a computerized "buzzword" analysis of the programming. Garden State paid Journal Graphics the sum of $10,716 for its services. Thus, Garden State's total expenditures for expert and technical assistance in preparation for trial amounted to approximately $30,000. (Garden State's PFC at 7-8 and Garden State Exh. 7.)

Settlement Negotiations

44. In January 1990, at the instance of the Judge in the New Jersey federal court action, Mr. Hadl instructed WWOR-TV's litigation counsel to arrange a meeting with Mr. Cohen to discuss settlement. (Cohn, Tr. 1571; Hadl, Tr. 1088, 1094.) Shortly thereafter, Mr. Cohen, Mr. Berfield, Mr. Hadl, Mr. Gardner, and Mr. Denvir[10] met in the Washington, D.C. offices of WWOR-TV's counsel to discuss settlement. (Hadl, Tr. 1313; Denvir, WWOR Exh. 92.) Each side expressed an opinion on the merits of their respective cases but no dollar amount was mentioned. (Hadl, Tr. 1100-01; Berfield, Tr. 1313-14; Cohen, Tr. 1574; Denvir, WWOR Exh. 92.) Nothing came of the meeting. Mr. Cohen made a report on the meeting to Ms. Wells, Mr. Harold Fetner (Sidney Fetner's son) and Mr. James Castigan, limited partners for Garden State. (Cohen, Tr. 1575.)

45. In April 1990, Mr. Denvir contacted Mr. Cohen and arranged to meet. (Berfield, Tr. 1314; Cohen, Tr. 1575-76; Denvir, WWOR Exh. 92.) While disclosing to Mr. Cohen that he had no authority to bind WWOR-TV to settlement terms, Mr. Denvir unilaterally conveyed to Mr. Cohen the willingness of WWOR- TV to settle for expenses, estimated at that time to be about $450,000. (Cohen, Tr. 1576-77; Denvir, WWOR Exh. 92.) Mr. Cohen reported the offer to Ms. Wells and she refused to settle for expenses. (Cohen, Tr. 1578.) Nothing resulted from Mr. Denvir's efforts which he reported to Mr. Hadl. (Hadl, Tr. 1109-10; Denvir, WWOR Exh. 92.)

46. In May 1990, Mr. Denvir again met with Mr. Cohen to discuss settlement and there it was stated to Mr. Denvir by Mr. Cohen that Garden State would insist on receiving more than $1 million to settle. (Cohen. Tr. 1578; Denvir, WWOR Exh. 92.) But Mr. Denvir had no authority at that point in time to make an offer. (Hadl, Tr. 1131; Cohen, Tr. 1580; Denvir, WWOR Exh. 92.)

47. In mid-September 1990, through his senior executive position with MCA, Mr. Hadl was aware that an international company was engaged in negotiations to acquire MCA. Mr. Hadl testified that those negotiations heightened MCA's interest in reaching a settlement with Garden State. (Hadl, Tr. 1112-15.) MCA initially offered $1 million and after conferring with Ms. Wells, Mr. Cohen countered for $5 million. Mr. Hadl offered $2 million as MCA's last offer which Ms. Wells accepted when Mr. Cohen informed her of the amount. (Hadl, Tr. 1158-59; Cohen, Tr. 1584-85.)

CONCLUSIONS OF LAW

48. There are proposed findings submitted by the Bureau with respect to "other ventures" of Cohen & Berfield which are not relevant to the resolution of the added issue.[11] There also were findings proposed by Garden State on its perceptions of the state of the Judge's bias and prejudice, which charges are deemed to be irrelevant to consider here without there being a third request made for the Judge's disqualification under §1.245 of the Commission's rules.[12]

49. The facts found above fail to show that Ms. Wells filed the Garden State application in order to obtain a settlement. Although settlement was a future possibility that was contemplated by Garden State and its counsel when Mr. Cohen's retainer agreement *cum* bonus was signed, the provision in a retainer agreement for a settlement bonus does not *ipso facto* establish that Garden State's application was filed for the purposes of reaching or carrying out settlement. In fact, there was also a provision in the retainer agreement to compensate the law firm with a bonus if Garden State were to win the license after full litigation. Also, there was provision for twice the capital investment in Garden State compared with Mainstream which evidences a determination on the part of Garden State limited partners to cover substantial litigation expenses. Therefore, it is concluded that Garden State was disposed to litigate the case to its conclusion when it retained Cohen & Berfield, P.C and filed its application.

50. The evidence further shows that Garden State was vigorously litigating this case up until the fruitful phase of settlement negotiations in September 1990. *See e.g.* Transcripts of Hearings held August 23 and September 13-14, 1990, wherein public written testimony was received and rejected. In addition, Garden State had expended approximately $30,000 in costs for an expert and litigation assis-

tance. Section 311(d)(3)(B) of the Communications Act of 1934, as amended (the "Act") provides for approving only settlements where:

> - - - no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Pertinent legislation history reflects Congressional concern with the filing of a "frivolous application for a station license in order to harass an incumbent." *H. R. No. 97 - 208*, July 29, 1981, P&F Radio Reg. at 10:605, 10:608. The evidence showing the nature and the extent of Garden State's participation in the pre-hearing and hearing phases of this case[13] establishes that its application was not frivolous or intended to harass.

51. The Bureau argues in conclusion that the record contained evidence that Garden State's application "may have been filed for the purpose of carrying out a settlement." *See* Bureau PFC at 30. The Bureau's primary concern seems to be with the absence of proof which could best be shown by Garden State as to when Ms. Wells began reviewing WWOR-TV's programming and reported her adverse conclusions to Mr. Cohen. WWOR-TV began broadcasting on April 3, 1987, the date of acquisition. Ms. Wells was involved with Mr. Cohen in an unrelated broadcast application in that same month. Yet no one who was a party to a dinner meeting in New York has any specific recollection or written record that pins down the date of the meeting between Mr. Cohen, Ms. Wells and Mr. Fetner on the challenge to WWOR-TV's renewal. These circumstances leave open the question of when Ms. Wells had the opportunity to review programming before Mr. Cohen relayed her concerns to Mr. Fetner, the person who apparently was interested after his success with Mainstream to return to the "chase." Nonetheless, even with the admitted speculation motive on Mr. Fetner's part as the reason for his participation in the comparative renewal process, the evidence does not establish that Mr. Fetner's "chase" did not encompass winning the license as the sole reason for filing Garden State's application on December 23, 1987. Nor would it be reasonable or rational to assume that settlement was a viable option to Mr. Fetner, Ms. Wells, Mr. Cohen or Garden State until there was an exchange of evidence, deposition discovery, and an offer to settle was made by the renewal applicant.

52. Nor does the evidence support a conclusion that there has been an abuse of the Commission's process. The Commission has defined the term "abuse of process" as:

> the use of a Commission process, procedure, or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure or rule in a manner which subverts the underlying intended purpose of that process, or rule.

First Report and Order in BC Docket No. 81-742, 4 F.C.C. Rcd 4780, 4793 n. 1 (1989). Since settlements are provided for by the Act [§311(d)] and Commission rule [§73.3525], there is nothing intrinsically illegal in presenting a *bona fide* settlement as a potentially alternative option to lengthy litigation at some time in the course of the proceeding. It is only required that when the applicant files an application on Form 301, the applicant must then have an intention to receive a construction license from the Commission, a frame of mind which is reasonable to assume with the act of filing, unless the document is frivolous on its face or there is convincing extrinsic evidence to the contrary. *See Memorandum Opinion and Order in BC Docket No. 81 - 742*, 5 F.C.C. Rcd 3902, 3903 (1990) ("abuse [of process] is not an easy matter to prove"). Proof of a frivolous filing and proof of the element of intent to abuse the filing process are distinctly lacking here.

53. Mr. Cohen and Ms. Wells have testified that the subject of settlement was never discussed before the application was filed, positions that the Bureau argues were "contrived." *See* Bureau PFC at 32. But as found above, there is no direct evidence that rebuts the Cohen/Wells denials and their joint experiences with Mainstream had illustrated to them that settlements, as accepted by the Commission at that time, were always a potential development as the case proceeded into discovery and litigation stages. And, of course, there is the occasional serendipitous event that sometimes occurs, such as here, with the emergence of a suitor for the station's parent company which could not have been predicted when Garden State filed its Form 301. Thus, without evidence of a rational expectation of receiving a settlement offer at or soon after the filing of an application, the wrongful intent of filing for the purpose of settlement is not established on the record made in this case.

54. To the extent that there are circumstances here that the Bureau finds "troubling,"[14] the Commission has addressed such concerns for the future by limiting settlement payments, noting:

> We believe this approach furthers a number of important policies. By prohibiting all payments in excess of legitimate and prudent expenses made anytime during a comparative hearing, we are eliminating most of the potential profit to applicants in filing competing applications.

First Report and Order, *supra*, 4 F.C.C. 2d at 4783. Thus, the Commission has focused on and has addressed the policy concerns of these settlements. Clearly, the acceptance of this particular settlement involving payment of a substantial sum of money under circumstances perceived as "troubling" to the Bureau will not serve as a precedent for any future settlement. Even the Bureau concedes that "the record here, taken as a whole, does not support a conclusion that Garden State filed its application for an improper purpose." *See* Bureau PFC at 33.[15] WWOR-TV, not surprisingly, urges findings that are favorable to Garden State and the proposed settlement. *See* WWOR-TV PFC at 20-23. Thus, no opposing party has cited a precedent or presented an argument that would support a finding on the evidence that is adverse to permitting Garden State to participate in a money settlement in return for its dismissal.

55. It is further noted that Garden State disputes the existence of even circumstantial evidence to support an allegation that Garden State filed its application for purposes of settlement. *See* Garden State Reply PFC. Garden State asserts that the Bureau has made a "quibble" over the inability of witnesses to recall the date of a meeting among Mr. Cohen, Ms. Wells and Mr. Fetner that took place four years ago. (*Id.*) But the Presiding Judge does

not see that evidentiary weakness to be a mere "quibble." It is a material circumstance that is troubling in not being resolved with the precision of clear and convincing evidence that has been weighed and considered by the undersigned. But any adverse inference is off-set by the direct evidence noted above of Garden State retaining Dr. Johnson and vigorously litigating this case into the hearing phase on public witnesses. The wrongful intent can only be determined from the totality of the evidence and not from the lapses in memories of Mr. Cohen and Ms. Wells.

56. Garden State also argues in its Reply that there is no evidence to support the Bureau's argument that the testimony of Mr. Cohen and Ms. Wells "appears contrived" with respect to there being no mention of settlement. *See* Garden State Reply PFC at 2-3. It is noted that the phrase used by the Bureau, "appears contrived" addresses only appearances. There will be no adverse inference drawn based on a circumstantial appearance except as it impacts on the totality of a particular witness' credibility. The Presiding Judge has considered that testimonial episode and has concluded that with the prior experience that Mr. Cohen, Ms. Wells and Mr. Fetner gained through the Mainstream settlement, there was no need for Mr. Cohen, Mr. Fetner or Ms. Wells to mention settlement in their first discussion. Thus, the testimonial credibility of Mr. Cohen or Ms. Wells, while not having been established by them, has not been tainted. Garden State argues further that there is no assurance gained from the fact of the Mainstream settlement with RKO that MCA would do likewise in this case. *See* Garden State Reply PFC at 3. That assertion is true. But the rational inference to be drawn is that the three persons were sensitized through the Mainstream experience[16] to the then speculative possibility of receiving a settlement offer as litigation progressed, a reasonable inference to be drawn in view of the temporal proximity of the Mainstream settlement with a payment of $5.6 million just three months prior to the formation of Garden State by July 1987.

57. The remainder of Garden State's Reply arguments are directed toward other ventures that involved Mr. Cohen and persons who were limited partner investors in Mainstream or Garden State. *See* Garden State Reply PFC at Paras. 4 to 13. Those matters have been determined to be irrelevant for purposes of this decision and need not be addressed further. *See* fn. 11, *supra*. Nor are there any adverse findings or conclusions made here to the legality or ethical propriety of fee arrangements of Cohen & Berfield, P.C.

SUMMARY CONCLUSIONS

58. Garden State has met its burden of proof on the added issue. Furthermore, aside from the meeting of the burden of proof, the evidence of record, considered as a whole, does not establish that Garden State's application lacked *bona fides* when it was filed, or that Garden State's application was filed for the purpose of reaching or carrying out a settlement agreement which would result in the dismissal of its application, or that Garden State abused a Commission process through its application or otherwise, or that Garden State misrepresented or lacked candor in certifying that it did not file its application for an improper motive or lack of good faith. Therefore, Garden State is qualified under §311(d) of the Act to participate in a money payoff in return for a dismissal with prejudice of its application for a construction permit for a new commercial TV station to operate on Channel 9 at Secaucus, New Jersey.

59. The evidence shows that approximately three months after Mainstream received a settlement of $5.37 million, Mr. Cohen and Mr. Fetner promoted a venture to challenge WWOR-TV's renewal application. Mr. Cohen, Mr. Fetner and Ms. Wells were of the opinion that the programming of WWOR-TV that had commenced on April 3, 1987, was not meeting the needs of Northern New Jersey and that therefore a meritorious challenge could be made to the station's renewal application. Ms. Wells agreed to serve again as general partner for a group of investors who were friends and relatives of Mr. Fetner. The challenge was vigorously litigated by Garden State without any consideration to settlement until WWOR-TV's vice-president and general counsel made an offer to Mr. Cohen in January 1990. The parties then continued to consider settlement from time to time through probes initiated by WWOR-TV's trial counsel in April and May 1990. In September 1990, when MCA was approached by a serious take-over suitor, WWOR-TV principals made a concerted effort to settle with Garden State for $2 million and that effort succeeded with the settlement agreement that was filed on September 27, 1990.

60. For its part, WWOR-TV is qualified to continue to operate its TV station on Channel 9 at Secaucus, New Jersey as proposed in its renewal application, and there is no longer a challenging application or the need to determine which proposal would, on a comparative basis, best serve the public interest. *See Hearing Designation Order*, MM Docket No. 88-382, DA 88-1077, released July 22, 1988, published at 53 Fed. Reg. 28911 (August 1, 1988). In reaching this conclusion, the Presiding Judge has taken into account the matters pertaining to the transfer of control and allegations of foreign control that were fully considered by the Commission in its *Memorandum Opinion and Order*, FCC 90-424, *In re Application of WWOR - TV, Inc. for Transfer of Control of Station WWOR - TV, Channel 9 Secaucus, New Jersey*, FCC 90-424, released December 26, 1990 (denying oppositions of Garden State Broadcasting Limited Partnership, Whitely Communications and Mr. Michael Krauss to a short form [FCC Form 316] spin-off of control from parent company MCA, Inc. to the shareholders of MCA, Inc. in connection with a tender offer for all its shares from a subsidiary of Matsushita Electrical Industrial Company, Ltd., a firm organized under the laws of Japan). There the Commission authorized the use of a short form to effect a spin-off of shares of WWOR-TV, Inc. to the shareholders of MCA's common stock before control passes to Matsushita, noting in the ruling that its "effect, if any, on the comparative hearing or settlement agreement is for [the presiding Administrative Law Judge] to decide in the first instance." The Presiding Judge notes that there is no adverse implication from MCA's use of the short form to transfer control of Channel 9 to an entity controlled by United States citizens or from Garden State's opposition to the short form transfer. The Commission has found in a factually detailed and reasoned ruling that the proposed transfer of control by spin-off to common shareholders of MCA, at least 83% of which are United States citizens, would not involve a substantial change in ownership or control and there would be no possible violation of §310(b) of the Act prohibiting foreign ownership of 25% or more of a United States broadcast facility. *Id.* at 3-5

and 5-13. Those rulings do not effect the findings, conclusions and settlement considered, made and accepted herein. Accordingly, WWOR-TV's renewal application is now set to be granted.

SETTLEMENT

61. The acceptance of the proposed settlement would conserve Commission resources by avoiding further litigation of this case which would be substantial in terms of time and commitment. Acceptance of the settlement also would result in the termination of ongoing litigation in the United States District Court of New Jersey. The termination of all such litigation will permit the key personnel of WWOR-TV to turn full time and attention to providing broadcasting for Northern New Jersey at the earliest possible time. Except for the restrictive covenant discussed below, the settlement proposal will be accepted at this time in light of the request for "expedited approval."

62. The proposed restrictive covenant precluding Garden State from making "filings" for eight years provides as follows:

> Garden State and Wells further agree that they will not file or participate directly or indirectly in any proceeding (whether or not docketed) involving an application, petition, motion, complaint or other pleading that relates to the broadcast license of station WWOR-TV and is filed with the FCC or any court prior to April 21, 1998, nor during that time period will Garden State or Wells attempt or seek leave to file any competing application not ordinarily permitted by FCC rules.

(WWOR Exh. 216.) This provision appears in Paragraph No. 1 at P.2 of the document entitled "Settlement Agreement. The accompanying Joint Request asks for its "expedited approval." As indicated above, this restrictive covenant is exceedingly broad, was objected to by the Bureau, and was rejected by the Presiding Judge (FCC 90M-3220). There has been no mention made in the Proposed Findings and Conclusions of any attempt by the parties to revisit this covenant to attempt to make it more reasonable. *Compare Memorandum Opinion and Order*, FCC 88M-2622, (WBBM-TV, Admin. L.J.) released August 12, 1988 (presiding judge denied broad covenant not to compete). Moreover, the spirit, if not the letter, of the proposed covenant was already violated by Garden State's opposition to the short form transfer of control (FCC 90-424). *See* discussion *supra* at Para. 60, of the Commission rulings in *In re Application of WWOR - TV, Inc. for Transfer of Control of Station WWOR - TV, Channel 9 Secaucus, New Jersey*, FCC 90-424, released December 26, 1990. The seeking of expedited approval and the actions of the parties after the proposed covenant was rejected are circumstances indicating an abandonment of the covenant as a condition to settlement.

63. The proposed covenant extends for eight years and appears to cover every conceivable filing that might effect Channel 9. In *Dayton Telecasting, Inc.*, 96 F.C.C. 2d 214, 215-16 (Review Bd 1983) a five year covenant not to compete was rejected. *Compare Raul Santiago Roman*, 38 F.C.C. 290, 295-96 (Review Bd 1965) (five year covenant approved where evidence showed a need for temporary protection to preserve value of assigned station and territorial limits were imposed). In this case, there is no showing that WWOR-TV, or its spin-off successor, will need such protection to preserve the station's value. In fact, there has been no showing that the covenant is ancillary to the sale of any business, that the covenant is intended to prevent Garden State and Ms. Wells from derogating the value of Channel 9, and that an eight year period is needed to effect those interests or to preserve the station's value. *See Raul Santiago Roman*, *supra* at 294, and cases cited therein.

64. There are additional equitable considerations that show public interest reasons to not restrict Garden State from participating in the community dialogue process effecting Channel 9's broadcasting. The restrictive covenant, if implemented, would contravene the Commission's policy that encourages public participation in the allocation, licensing and renewal processes. *See Amendments of Commission's Rules Concerning Abuses of the Commission Processes*, FCC 87-265, released September 3, 1987. And the court of appeals has noted that listening and viewing audience are among the best vindicators of the public interest. *Office of Communication of the United Church of Christ* v. *F. C. C.*, 359 F.2d 994, 1005 (D.C. Cir. 1966). Garden State, and particularly Jean Wells, have closely followed Channel 9's broadcasting. Ms. Wells also has acquired familiarity with the licensee's duty to meet local needs. Yet, without a showing of any overriding business reason or a showing of any past "strike" filings, the parties seek a Commission endorsed restrictive covenant that would arbitrarily silence Jean Wells for eight years, notwithstanding the above stated policies. Certainly, Garden State and Jean Wells are aware that the law prohibits the filing of spurious pleadings for the purpose of securing a settlement or to otherwise abuse the Commission's processes. 47 U.S.C. §311, 47 C.F.R. §73.3525. *See also Amendment of Commission's Rules Concerning Abuses of the Commission's Processes*, *supra* at 4 (strike petition), 11 (threats to file petitions), and 16-17 (allocation rule making). Thus, there are no convincing reasons shown for approving the settlement agreement's restrictive covenant. Also, with the limitations that are now imposed on settlements to only the legitimate and prudent expenses, coupled with Ms. Wells' turning her full time and attention to a new business venture and Mr. Fetner's demise, it is most unlikely that Ms. Wells or Garden State would launch another venture to obtain control of Channel 9.

ORDER

Accordingly, because the preponderance of the evidence fails to prove that Garden State Broadcasting Limited Partnership filed its application in this case for the purpose of reaching or carrying out a settlement agreement or that the applicant abused a Commission process, IT IS FOUND that Garden State Broadcasting Limited Partnership IS QUALIFIED to participate in a monetary settlement in this case in return for the dismissal with prejudice of its application.

IT IS FURTHER FOUND that the Form 301, as amended, that was filed by Garden State Broadcasting Limited Partnership was a *bona fide* application, that the Commission's processes were not abused by Garden State Broadcasting Limited Partnership, and that Garden State Broadcasting Limited Partnership has not misrepresented

or lacked candor in certifying to the Commission that it did not file its application for an improper motive or with any lack of good faith.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Settlement Agreement filed on September 27, 1990, by WWOR-TV, Inc., Garden State Broadcasting Limited Partnership and Jean Wells IS ACCEPTED AND APPROVED, except for the exclusionary covenant in the third sentence of Paragraph 1 that prohibits Garden State and Jean Wells from filing pleadings relating to the broadcast license of WWOR-TV prior to April 21, 1998, which SHALL NOT BE ENFORCED and IS STRICKEN from the Settlement Agreement.

IT IS FURTHER ORDERED that this Partial Initial Decision applies to WWOR-TV, Inc., its assigns (*e.g.* "Newco, Inc.") and to all succeeding entities which are or become entitled by a Commission authorized assignment or transfer of control (*e.g.* "Pinelands, Inc.") to broadcast on Channel 9 at Secaucus, New Jersey.

IT IS FURTHER ORDERED that the application of Garden State Broadcasting Limited Partership (File No. BPCT-871223KG) IS DISMISSED WITH PREJUDICE, the application for renewal of license of Station WWOR-TV, Secaucus, New Jersey (File No. BRCT-871221KE) IS GRANTED, and the Hearings set to commence on January 28, 1991, ARE CANCELLED.[17]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] A second competing applicant, Whitely Communications (File No. BPCT- 880321KM), was dismissed for non-compliance with procedural rules and orders. *See Memorandum Opinion and Order*, FCC 89M-2206, released September 6, 1989, *aff'd*, 4 F.C.C. Rcd 8127 (Review Bd 1989), *rev. denied*, 5 F.C.C. Rcd (Comm'n 1990).

[2] MCA has spent in excess of $1 million in legal fees in this renewal proceeding. (Hadl, Tr. 1092.) MCA estimates it would spend an additional $1 million on this case if it does not settle. (Hadl, Tr. 1093.) Continued litigation also would take top management away from more productive station business matters. (Hadl, Tr. 1091-92.)

[3] WWOR-TV also notes the ongoing civil litigation in the United States District Court for New Jersey involving claims by MCA, Inc. against Garden State and counterclaims asserted by Garden State against MCA, Inc. It is contemplated that the District Court case would be settled simultaneously with this proceeding.

[4] The fee portion of the agreement was stepped: legal work incident to filing, including waiver of Commission cut-off rule and anticipated court litigation for $75,000; legal work after application is accepted through a final decision for $174,000. It is in consideration of a guaranteed cap of $249,000 for extensive legal work (out-of-pocket expenses were included in the cap) that the retainer agreement provided for a 10% bonus. (*See* WWOR Exh. 26.)

[5] Dr. Johnson is a Professor of Psychology at Ramapo College of New Jersey. He wrote to Mr. Cohen that he "anticipated a flurry of legal activity" when he learned of the proposed sale of WOR-TV to MCA, Inc. As a result, Dr. Johnson advised Mr. Cohen in a letter dated April 18, 1986, that he had begun to videotape WOR-TV programming in order to be ready to conduct analyses.

[6] In rejecting Mainstream's contentions that MCA had failed to demonstrate that it would operate Channel 9 as a New Jersey rather than a New York station, the Commission noted that when it filed for renewal, MCA would run on the record established in the intervening period. 1 F.C.C. Rcd at 1089.

[7] Mr. Cohen was aware that the limited partnership agreement provided that where assets were to be disposed of, 51% of the equity owners would need to approve the transaction. (Cohen, Tr. 1395.)

[8] Mr. Cohen testified that he was unable to recall when the meeting took place. (Tr. 1441). Although Mr. Cohen maintained a diary of meetings and events that he attended in 1987, he claimed that his review of the diary prior to the hearing and in anticipation of questions on the topic failed to reveal any reference to his New York meeting with Ms. Wells and Mr. Fetner. (Tr. 1436-1437.) He also could not name the restaurant where the meeting took place. (Tr. 1441). Mrs. Fetner was not produced as a witness and Mr. Fetner is deceased.

[9] On June 7, 1988, MCA filed a lawsuit against Garden State and Jean Wells for breach of contract of the Mainstream agreement with RKO that had been assigned to MCA. The action was commenced in the United States District Court for the District of New Jersey (Civil Action No. 88-2508) wherein the court denied cross-motions for summary judgment.

[10] Mr. James R. Denvir has been actively engaged in representing WWOR-TV at the lengthy pre-hearing stages of this case. Because of his unavailability due to a conflicting court commitment, Mr. Denvir was permitted to testify by declaration to his involvement in settlement. A declaration executed on October 29, 1990, was received in evidence. (WWOR Exh. 92; Tr. 1862.)

[11] The Presiding Judge permitted evidence to be introduced on cross-participation of limited partners in groups represented by the Cohen & Berfield law firm that challenged other renewal applicants. *See Clay Frank Huntington*, 61 F.C.C. 2d 123, 124 (Review Bd 1976) (evidence of pattern accepted on issue of intent to deceive). Here the Bureau questioned Mr. Cohen on renewal challenges in which only one bonus was paid. Two additional cases had bonus arrangements but no payments. One case settled for expenses only. Such evidence is too tangential to establish a pattern of settling cases through a single law firm in order to obtain bonuses. Nor is there any direct evidence that shows that any of those applications were filed for the purpose of obtaining a settlement.

[12] *See WWOR - TV, Inc.*, 5 F.C.C. Rcd 2845 (Comm'n 1990) (Comm'n rejects Garden State's motion to disqualify Presiding Judge on grounds of bias and prejudice alleged to be shown by his adding this issue against Garden State). *Compare* also *WWOR - TV, Inc.*, 4 F.C.C. Rcd 6155 (Comm'n 1989) (former applicant Whitely Communication's motion to disqualify Presiding Judge on similar grounds denied by Commission). Garden State even complains of an appearance of impropriety in the Judge's questioning of WWOR-TV's witness. First, it is noted that no error or impropriety was asserted by WWOR-TV or by the Bureau. Second, there is a responsible trend in the law that acknowledges the value of a Judge's active participation through questioning witnesses on factual matters that effect the substantive merits of an issue. *See e.g., Reform Proposals To Compara-*

tive Hearing Process, FCC 90-410, released December 21, 1990 at 17 (comment submitted suggesting that cross-examination by applicants' counsel should be eliminated and all witnesses should be questioned only by the presiding judge). This Judge will continue to primarily rely on the skills of trial counsel to elicit relevant facts from witnesses while actively participating in the questioning process only where it is deemed necessary to make the record for a decision. Such judicial participation in questioning is particularly appropriate where, as here, the procedural posture of settlement undercuts the incentive of competing parties to vigorously litigate as compared with the situation when a case is advancing in a full-blown trial on all issues and parties have an incentive to best or disqualify the competition.

[13] *See e. g.*, Motion for Stay of discovery rulings filed November 1, 1988, denied by *Memorandum Opinion and Order* released November 14, 1988 (FCC 88M- 3846); Supplement to Motion to Stay filed November 8, 1988 and *Order* refusing to reconsider ruling released November 25, 1988 (FCC 88M-4046); Motion Opposing the Taking of Depositions and for Protective Order filed on November 14, 1988, denied in part by *Memorandum Opinion and Order* released November 30, 1988 (FCC 88M-4072); Appeal to Review Board and Motion for Stay filed November 21, 1988, denied as an unauthorized interlocutory appeal by *Memorandum Opinion and Order* released December 22, 1988 (FCC 88R-66); Motion to Quash filed on February 13, 1989 by Jean Wells, denied for the most part by *Memorandum Opinion and Order* released February 24, 1989 (FCC 89M-639); Motion Opposing the Taking of Depositions filed on August 10, 1989, denied by *Memorandum Opinion and Order* released August 25, 1989 (FCC 89M-2163); Motion for Temporary Stay filed on August 28, 1989 in connection with request for withdrawal of Presiding Judge filed August 31, 1989; stay denied by *Order* released September 6, 1989 (FCC 89M-2207). By *Memorandum Opinion and Order* released September 12, 1990, a Motion for Stay re Production of Privileged Documents filed on August 31, 1989 was denied; a Motion to Quash filed by Messrs. Cohen and Berfield on September 14, 1989 was denied by *Memorandum Opinion and Order* released October 3, 1989 (FCC 89M-2394); a Memorandum Regarding Privilege Claims was filed on August 25, 1989, and the claims denied in part by *Memorandum Opinion and Order* released May 15, 1990 (FCC 90M-1198). *See also, e.g.*, Appeal filed August 21, 1990 by Jean Wells, denied in part by Review Board *Memorandum Opinion and Order* released July 6, 1990, (FCC 90R-54); Petition for Stay filed with the Commission by Jean Wells on June 26, 1990, declared moot by Commission's ruling requiring production of documents of Mainstream claimed to be privileged, Comm'n *Memorandum Opinion and Order*, FCC 90-345, released October 18, 1990.

[14] *See* Bureau PFC at 33.

[15] The Bureau and WWOR-TV support accepting a settlement in this case. There is no party that objects to permitting a settlement to be concluded that involves a monetary payment to Garden State.

[16] Garden State makes a narrow argument on relevancy, pointing out that Mainstream's situation was procedurally different from the Garden State application. But settlement to Ms. Wells, a layperson, and to Mr. Fetner, who wanted the "chase," was a state of general awareness of a potential for settlement, not a narrowly focused probability that would take into account procedural differences and the probability of a lawsuit which are considerations that would call for a formal legal opinion.

[17] This *Partial Initial Decision* disposes of this case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-48

In the Matter of

Amendment of Section 73.202(b),	RM-5772
Table of Allotments,	RM-5941
FM Broadcast Stations.	RM-6533
(Arlington, McKinney, Celina,	RM-6534
Terrell, Daingerfield, College	RM-6535
Station, Caldwell, and Howe,	RM-6536
Texas; and Durant, Oklahoma)	

MEMORANDUM OPINION AND ORDER

Adopted: December 26, 1990; Released: January 11, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a "Motion to Sever" filed by Evergreen Media Corporation of Dallas ("Evergreen"), licensee of Station KHYI, Channel 235C1, Arlington, Texas. The Motion to Sever is directed to the Report *and Order* in this proceeding, 5 FCC Rcd 2660 (1990), which, *inter alia*, substituted Channel 235C for Channel 235C1 at Arlington, Texas, and modified the Station KHYI license to specify operation on Channel 235C.[1] Roy E. Henderson filed an Opposition, and Evergreen filed a Reply. For the reasons discussed below, we grant the Motion to Sever.

2. On May 24, 1990, Roy E. Henderson ("Henderson"), permittee of Station KHEN, Channel 236A, Caldwell, Texas, filed an Application for Review directed to the *Report and Order* in this proceeding. The Application for Review was filed because the *Report and Order* did not consider a Henderson petition for rule making looking toward a Channel 236C2 upgrade at Caldwell. Under Section 1.420(f) of the Commission's Rules, the upgrade at Arlington was stayed by the filing of the Application for Review.

3. A Channel 236C2 upgrade at Caldwell was in conflict with the originally proposed Channel 235C2 upgrade at College Station, Texas. *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 964 (1988). However, the *Report and Order* granted Station KTSR an upgrade on Channel 297C3, thereby removing any conflict between a Channel 236C2 upgrade at Caldwell and any allotment either proposed or granted in this proceeding.

4. In support of his Opposition, Henderson argues that we should not resolve MM Docket No. 88-48 in "piecemeal" fashion by severing the upgrade at Arlington from this proceeding. Furthermore, Henderson contends that in view of previous actions by the licensee of Station KTSR opposing his request for a Channel 236C2 upgrade at Caldwell, we "cannot say with certainty that a connection no longer exists" between the allotments granted in the *Report and Order* and the proposed upgrade at Caldwell.

5. These arguments do not justify denying the Motion to Sever. In a separate docket, we are going forward with a *Notice of Proposed Rule Making* looking toward the Channel 236C2 upgrade at Caldwell. In the event that we grant the proposed upgrade, the Application for Review would become moot. While this docket is pending, we see no reason why Evergreen should not go forward with the implementation of its upgrade at Arlington. Granting the Motion to Sever will not delay the overall resolution of MM Docket No. 88-48, and will lead to an early commencement of enhanced service by Station KHYI. We do not believe that this is a "piecemeal" resolution of this matter or in any manner contrary to the public interest. As indicated earlier, there is no longer any technical conflict between the Caldwell upgrade and any allotment in this proceeding. Previous opposition by the licensee of Station KTSR to a Caldwell upgrade does not constitute a conflict or connection.[2] Moreover, the Application for Review is not directed against the upgrade at Arlington, College Station, or any allotment which could impact on the Arlington upgrade. As such, we believe that there is no need to stay the effectiveness of the Channel 235C upgrade at Arlington, Texas. *See Clemson, South Carolina*, 2 FCC Rcd 5970 (1987).

6. Accordingly, IT IS ORDERED, That the aforementioned Motion to Sever IS GRANTED.

7. IT IS FURTHER ORDERED, That the Opposition to Motion to Sever filed by Roy E. Henderson IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Report and Order* also upgraded Station KTSR, College Station, Texas, to specify operation on Channel 297C3, allotted Channel 237A to Howe, Texas, as a new service, and substituted Channel 295A for Channel 237A at McKinney, Texas.

[2] In this regard, we also note that there is no conflict between the Channel 297C3 upgrade at College Station and the proposed Channel 236C2 upgrade at Caldwell.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-491

In the Matter of

Amendment of Section 73.202(b),	*RM-6371*
Table of Allotments,	RM-6650
FM Broadcast Stations.	
(*Vacaville* and Middletown,[1]	
California)	

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 11, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by Joe L. and L. Ann Gross ("the Grosses"), who request reconsideration of the *First Report and Order* ("*R&O*") in this proceeding, 4 FCC Rcd 8315 (1989). The *R&O* granted the request of Quick Broadcasting, Inc. ("Quick"), licensee of Station KUIC(FM), Channel 237A (95.3 MHz), Vacaville, California, for a co-channel upgrade to Channel 237B1 and modification of its license accordingly. Quick filed an opposition to the Grosses' petition, and the Grosses filed a reply. Both parties subsequently filed a number of pleadings beyond the normal pleading cycle.

BACKGROUND

2. In response to the *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 6128 (1988), proposing the channel upgrade at Vacaville, the Grosses, who jointly own 60% of the stock of Goldrush Broadcasting, Inc., licensee of nearby Station KDJK(FM), Channel 236B, Oakdale, California, filed a counterproposal that Middletown, California, be allotted Channel 238A. In the *R&O*, we determined that Channel 254A is available as an alternative, equivalent channel, and could be allotted to Middletown without imposing a site restriction, which would be required for the allotment of Channel 238A. We decided that because there were questions as to Middletown's status as a community, no allotment would be made at that time. Therefore, subsequent to the release of the *R&O*, we issued the *Further Notice*, *supra* note 1, that separately proposed the allotment of Channel 254A to Middletown and requested additional demographic data. Those data will assist us in determining whether Middletown is a community for allotment purposes.

3. In opposing the Vacaville upgrade, the Grosses had claimed that the mountainous terrain between Quick's proposed transmitter site and Vacaville would cause severe shadowing, and would preclude the availability of an alternate site from which a signal of at least 70 dBu could be provided over all of Vacaville. Furthermore, because of co-channel and adjacent channel constraints, the Grosses argued, Quick could not comply with Section 73.315(b) of the Commission's Rules, which recommends that a site be selected so that line-of-sight may be achieved over the city to be served and that no major obstructions lie in that path. We determined that the technical feasibility of Quick's proposal rested ultimately on whether a 70 dBu signal could be provided over the entirety of Vacaville. Based on a staff engineering analysis incorporating an examination of the pertinent terrain, we disagreed with the Grosses' assessment. We found that a signal of at least 70 dBu field strength could be provided over the entire community of Vacaville from Quick's preferred site utilizing an antenna with a height of 230 meters (755 feet). We also found that there existed an alternate site from which the required coverage of Vacaville could be provided using an antenna of 30 meters (98 feet) in height. Thus, the *R&O* granted Quick's allotment request for an upgraded Channel 237B1.

THE PLEADINGS

4. In their petition for reconsideration, the Grosses contend that there was insufficient explanation of how the Commission reached its conclusion as drawn from the staff engineering study. The Grosses argue that the *R&O* did not mention the Grosses' engineering showings demonstrating that Quick's proposal was technically deficient, or explain why Quick's engineering statements were preferable to those of the Grosses. They contend that the Commission simply chose to accept Quick's engineering statements as accurate, discounting those of the Grosses. The Grosses further contend that in cases of questionable antenna sites located in extremely mountainous terrain causing severe shadowing, as here, a party such as Quick should have conducted propagation tests to show definitively that sufficient coverage could be provided over Vacaville. The Grosses argue that the Commission not only failed to require such tests, but also failed to conduct its own independent engineering study to ensure that adequate coverage of Vacaville could be provided in spite of shadowing.[2] The Grosses contend that the absence of reasons for the Commission's acceptance of Quick's engineering statements, despite substantial errors pointed out by the Grosses, demonstrates that the Commission has not satisfied its obligation to support its decisions with findings of fact and reasoned explanations.

5. In opposition, Quick states that it finds it inexplicable that the Grosses have filed a petition requesting reconsideration of the *R&O* in light of our issuance of the *Further Notice* responding to their counterproposal for an allotment to Middletown. Quick nevertheless offers an explanation of the Grosses' motivations by pointing out that the Grosses are the principal owners and managers of Station KDJK(FM), which operates nearby on Channel 236B adjacent to Quick's present Channel 237A. Quick contends that the Grosses submitted their counterproposal to block the allotment of Channel 237B1. According to Quick, this is borne out by the Grosses' filing an application to move the transmitter site for their Station KDJK(FM) such that it would be short-spaced to the reference point for Channel 237B1. Additionally, Quick points to inconsistent statements made by the Grosses regarding the availability of two transmitter sites in pleadings relating to that application and in its pleadings in this proceeding.[3]

6. As to the merits of the Grosses' opposition, Quick claims that they "never *once* reached the conclusion that predicted coverage [of Vacaville] below-70 dBu would result" from an upgraded KUIC(FM) (emphasis in original). As to the Grosses' doubt that an independent Commission study had ever been conducted, Quick asserts that the very existence of the study undercuts most of the Grosses' arguments and that the study verifies the feasibility of the Vacaville allotment. Quick does not contest the Grosses' conclusion that shadowing would occur, noting that Section 73.315(b), advising that line-of-sight should be obtained and that a path free of major obstructions should exist, is not mandatory. A number of cases are cited by Quick as inapposite to the principle for which they were cited by the Grosses--that shadowing of a principal community would preclude an allotment.[4]

7. In reply, the Grosses submit an engineering statement, which they claim properly takes into account the mountainous terrain, and, in combination with interstation spacing requirements, restricts the area in which the transmitter site might be selected. The engineering statement seeks to show that a lack of the requisite 70 dBu coverage within significant areas of Vacaville would occur due to terrain obstructions. The Grosses argue that this case is similar to *Creswell, Oregon*, 4 FCC Rcd 7040 (1989) (" *Creswell* "), in that Quick would fail, as did the proponent in *Creswell*, to provide 70 dBu service to the principal community, and to "meet its burden that its site complies with *all* the Commission's engineering requirements" (emphasis in original).

8. The Grosses' engineering statement contains "detailed studies" of the signal propagation in the area of Vacaville, newly applying the propagation method commonly known as Tech Note 101[5], from "sites 1 and 3 as previously designated by KUIC." The studies investigate one radial path from each site, each path resulting in the shadowing of Vacaville that the Grosses consider as typical of that along other radials from that site. Conclusions arrived at in *Creswell*, they claim, are applicable to the propagation characteristics in Vacaville, whose surrounding terrain comprises rounded obstructions. The Grosses note that such obstructions, as the Commission observed in *Creswell*, cause greater signal attenuation than occurs over sharply defined terrain features such as cliffs or ridges (knife-edge propagation). Using formulas from Tech Note 101, the Grosses determined the free-space attenuation along each of the radials. They then deducted that attenuation from the predicted signal level as determined from the Commission's F(50,50) propagation curves. The Grosses found that the resultant received signal level to be less than 70 dBu along each radial from each of the two sites. Only along the radial from site 3 did they provide "detailed procedures and formulas for the calculation of attenuation of Radio Signal [due] to Isolated Rounded Obstacles." Along that radial at two points (of the three points investigated) in the interval 12.0 to 14.2 kilometers from the site, where they claim shadowing occurs, the Grosses predicted field strengths significantly less than 70 dBu. Therefore, they argue that these results along the radial from site 3 make it conclusive that a 70 dBu signal does not encompass all of Vacaville.

9. Quick responded to the Grosses' reply by filing a Motion to Strike the engineering statement contained in that reply. Asserting that the engineering study improperly presents for the first time in this proceeding a rebuttal to the Commission's analysis, Quick argues that the study should be stricken because it is not limited to matters raised in its opposition and improperly attempts to raise new matters to which our rules do not give Quick the opportunity to respond. Quick also contends that prior to the Grosses' filing of the engineering study, they had not stated that Vacaville would receive a signal of less than 70 dBu. Citing Section 1.429(b), which specifies the conditions under which new facts serve as a basis for a grant of a petition for reconsideration, Quick argues that the Grosses allege no changed circumstances, do not claim that they were unaware of or could not have learned of any new facts, nor do they show why consideration of those facts would be in the public interest. Moreover, Quick notes that the Grosses give no justification for their late filing.

10. Quick also submitted a response to the Grosses' engineering study, contending that it is flawed in two major respects. First, Quick argues that the areas claimed by the Grosses to receive less than a 70 dBu signal lie outside the city boundaries of Vacaville. Referencing two of its previously submitted engineering studies, Quick asserts that the Grosses' claim that less-than-70-dBu shadowing occurs at points certain distances from sites 1 and 3 are irrelevant because those points lie outside the boundaries of Vacaville.[6] Second, Quick further argues, even if those points fall within Vacaville, the results obtained still would be inaccurate because incorrect data had been used to compute the attenuation along the paths from each of the sites. Quick also purports to demonstrate that a "full" 70 dBu signal would be provided over all of Vacaville upon the correct application of Tech Note 101.[7] In summary, Quick's position is that the very late submissions by the Grosses do not undercut the Commission's decision, which should be affirmed.

DISCUSSION

11. The Grosses' petition for reconsideration will be denied. After failing to allege throughout this proceeding that the requisite signal would not be placed over Vacaville by Quick's proposal (instead, arguing that impermissibly severe shadowing would occur), the Grosses did so in their reply to Quick's opposition. They now make that allegation by raising a new set of issues and including fundamentally different engineering analyses from anything they had raised in this proceeding prior to filing their reply. Section 1.45, however, limits replies to matters raised in the oppositions. The Grosses' reply is comprised of an engineering statement concerning whether Vacaville is totally encompassed by at minimum a 70 dBu contour, a matter that, implicitly at least, has remained a point of contention during the whole of this proceeding. However, in that statement, the Grosses attempt to introduce an entirely new and detailed propagation analysis that had never before been addressed in these proceedings. In this sense, the Grosses' reply relies upon facts never before considered by the Commission. Section 1.429(b) prohibits grant of a petition for reconsideration when it relies upon such facts unless they relate to changed circumstances or could not have been uncovered with due diligence. Not only does the Grosses' petition clearly fail these tests, but it does not make the alternative showing that there is any public interest justification for our consideration of their late-filed engineer-

ing submission. Therefore, we cannot consider that information. Consequently, we will grant Quick's motion to strike the Grosses' engineering statement.

12. Upon dealing with the merits of the Grosses' petition, we agree with Quick that because the Commission provided the Grosses, in response to their FOIA request, a copy of the Commission's independent engineering study of principal city coverage of the entirety of Vacaville, this severely undercuts their main argument that such analysis may never have been conducted. As indicated in the *R&O*, using two different transmitter sites with antenna heights of 230 meters and 30 meters, respectively, we predicted that the entirety of Vacaville would receive at least a 70 dBu signal using the Commission's F(50,50) propagation curves.[8] Terrain profile graphs (using 30-second topographic data) revealed no shadowing in Vacaville from either of the two sites. The presence or absence of shadowing, however, was not critical to our conclusion that an allotment to Vacaville would comply with our rules. While good engineering practice calls for the avoidance of shadowing by locating the transmit antenna so that it has a line-of-sight path over the principal city with no major obstructions in that path, these provisions are not mandatory. Unlike these and other guidelines, such as locating the transmitter at the highest elevation possible, however, it is mandatory that a minimum field strength of 70 dBu be provided over the city to be served. *See* Section 73.315(a) and (b). Because our analysis demonstrated that all of Vacaville would likely receive a 70 dBu signal, Quick's proposal meets the Commission's primary coverage requirement for FM allotments.

13. Even if we were to consider the Grosses' stricken engineering statement as possible support for their assertion that a denial of their petition for reconsideration would result in granting a sub-standard allotment, the statement fails as support for their contention that the requisite coverage of Vacaville would not be possible. The statement does appear, nonetheless, to comply with our basic procedural requirements for supplemental propagation showings.[9] Although apparently compliant in these respects, the Grosses use faulty methodology to determine the received signal level. They have committed what is a fundamental, methodological error in deriving the predicted signal field strength in Vacaville. As the Grosses appear to recognize, they are obligated in the first instance to use the Commission's propagation methodology, which predicts the received signal by use of the F(50,50) curves that take into account attenuation due to average terrain. However, to account for the attenuation along that path due to the isolated rounded obstacle, the Grosses deduct from that received field strength the added attenuation calculated using Tech Note 101 for an isolated rounded obstacle *relative to free space*. This is incorrect. Because the F(50,50) curves do not predict field strengths at free space, but as attenuated over average terrain, the losses due to the obstruction, relative to free-space, cannot properly be deducted from the field strength predicted in accordance with Commission methodology.[10] For two of the three ranges from the transmitter, on the basis of the Grosses' flawed formulation using the F(50,50) curves and the attenuation using Tech Note 101, they conclude that less than a 70 dBu signal would be received. The Grosses' submission with its methodological deficiencies leads to the faulty conclusion that the required minimum signal would not be delivered to the entirety of Vacaville. Therefore, even had we considered their stricken engineering statement for its intended purpose, it does not support the Grosses' contention that Vacaville would not likely receive a 70 dBu signal.

14. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and §§0.61, 204(b), and 0.284 of the Commission's Rules, IT IS ORDERED That the Petition for Reconsideration filed by Joe L. Gross and L. Ann Gross IS DENIED.

15. IT IS FURTHER ORDERED That Motion to Strike filed by Quick Broadcasting, Inc. IS GRANTED.

16. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202)632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] We have separately addressed the allotment request for Middletown in a *Further Notice of Proposed Rule Making*, 4 FCC Rcd 8417 (1989) ("*Further Notice*"). A decision on that request is currently pending.

[2] The Grosses also submitted a Freedom of Information Act ("FOIA") request in order to obtain staff material that served as a basis for our findings. Subsequent to the filing of the Grosses' petition here, we forwarded to counsel for the Grosses the requested material.

[3] As we stated in the *Report and Order* in this proceeding, these issues need not be addressed in view of our determination herein.

[4] Among them are *Memorandum Opinion and Order* in MM Docket No. 84-442 (Aug. 13, 1986) and *Freedom and Morgan Hill, CA*, 2 FCC Rcd 2182 (1987) (allotments granted due to 70 dBu coverage despite shadowing); *Attica, NY* 54 FCC 2d 1137 (1975) (where allotment was denied due to close proximity of desired site to obstruction, and not because no shadow-free service from fully-spaced site could be had); and *Bloomsburg, PA*, 34 FCC 2d 940 (1972), *Greenwood, Seneca, Aiken, and Clemson, SC*, 3 FCC Rcd 4108 (1987), and *New Castle, PA*, 32 FCC 2d 131 (1971), *recon. denied*, 34 FCC 2d 553 (1972) (allotments denied due to available sites being too distant to provide full 70 dBu coverage, not because of lack of shadow-free service).

[5] P.L. Rice, A.G. Longley, K.A. Norton, and A.P. Barsis, "Transmission Loss Predictions for Tropospheric Communications Circuits," *NBS Technical Note 101*, first published in 1965 by the National Bureau of Standards.

[6] Quick claims that its engineering study attached to its "Reply to Untimely Filed Comments" of August 8, 1989, shows that Vacaville's boundaries begin at 13.7 km from Site #3 along the 139.7° radial. Thus, Quick argues, the Grosses' claim that below-70 dBu shadowing would occur at 12.0 km and 13.6 km from Site #3 are "irrelevant." Quick also argues that its engineering statement attached to its "Reply to Response" of February 27, 1989, shows that Vacaville's borders begin 11.6 km from Site #1 along the 189.00 radial (the Grosses' analyzed the

188.5^0 radial). Therefore, the Grosses' claim that below-70-dBu shadowing would occur 10.4 km from Site #1 is also irrelevant, insists Quick.

[7] Quick's analysis employs the Grosses' hand-generated elevation points taken from 7½-minute maps and the Commission's F(50,50) propagation curves. Quick predicted the received signal field strengths at various distances to Vacaville, as transmitted from Site #1 along the 188.5^0 radial and from Site #3 along the 139.7^0 radial. The diffraction losses due to the moutainous terrain were computed using formulas of Tech Note 101, and were deducted from the received field strengths. Quick also included a formulation based on the work of K. Bullington, "Radio Propagation at Frequencies above 39 Megacycles," *Proc. IRE*, vol. 35, pp. 1122-1136, October 1947, wherein the diffraction losses are referenced to smooth or plane earth. For this methodology, Quick used a Bullington nomograph, which graphically depicts how the median signal is attenuated due to shadowing, depending on the frequency and the average terrain roughness over the obstructions. The F(50,50) field strength is reduced by the attenuation due to the obstructions using the nomograph and is enhanced by the addition of 2.0 dB to offset the attenuation over the assumed average terrain when using the F(50,50) curves. Therefore, the resultant received field strength is that referenced to smooth earth. Additionally, Quick derived received signal strengths and drew the appropriate profile graphs using elevation points derived from a computer-generated 3-second terrain data base. Using these 3-second data, Fresnel zone losses were computed where appropriate, in addition to the losses due to the obstructions. Quick argues that each of the terrain profile graphs from each site to each of various receive locations outside of or in Vacaville clearly demonstrate that at least a 70 dBu signal would be received. This is so, Quick argues, whether employing data from 7½-minute maps or a 3-second data base (or a computer-generated 30-second data base, as Quick had shown in a prior submission), that the entirety of Vacaville would receive a signal with a predicted field strength of at least 70 dBu. Finally, Quick showed where, in several instances, the Grosses had used incorrect data that resulted in an overestimate of free-space attenuation factors.

[8] In instances where line-of-sight from the transmitter site may be difficult to achieve because of terrain obstructions, as here, we investigate whether the use of a taller antenna tower would permit achievement of both a transmission path to the community free of obstruction and the requisite signal for principal city coverage. Since we concluded that such coverage would be achieved from two qualifying sites, there was no need to require that propagation tests be conducted, as the Grosses urge, to confirm the likely provision of sufficient coverage or that supplemental prediction methods be employed.

[9] *See Reno, Nevada*, 3 FCC Rcd 5631 (1988). The procedures used for the preparation of the study as well as the assumptions and the methodology employed are set out along with the numerous equations used in evaluating the signal attenuation predicted using Tech Note 101. The Grosses also provide sample calculations showing how the methodology was applied to derive the predicted attenuation and, finally, the received signal strength within what are represented to be the boundaries of Vacaville. The attenuation is computed on the assumption that from each site along the single radial investigated the major obstruction can be represented as a rounded obstruction. There is no showing, however, that a rounded model is truly representative of that terrain, although it may be reasonable to assume that the mountains are generally more rounded than knife-edge and to use Tech Note 101 to compute the attenuation due to an "isolated rounded obstacle."

[10] The Grosses do, however, correctly compute the received field strength assuming free-space attenuation along one radial from Site #3, for three ranges from the transmitter. For the additional attenuation due to the rounded obstacle using Tech Note 101, only at 12.0 kilometers from the transmitter do they estimate that the received signal would be less than 70 dBu (69.1 dBu). As we indicate above, however, that resultant signal should reflect not only free-space losses but the attenuation due to the terrain over which the signal traverses. Quick's analysis does this by referencing the F(50,50) curves to smooth earth (by adding 2.0 dB), so that one could factor in correctly the attenuation over the rounded obstacle and could estimate the received signal by use of a Bullington nomogram, which is referenced to smooth earth.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-385

In the Matter of

Amendment of Section 73.202(b), RM-6892
Table of Allotments,
FM Broadcast Stations.
(Glen Arbor and Scottsville,
Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 26, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6700 (1989), proposing the substitution of FM Channel 240C2 for Channel 240A at Glen Arbor, Michigan, and the substitution of Channel 235C3 for Channel 240A at Scottsville, Michigan, in response to a petition filed jointly by David C. Schaberg ("Schaberg") and West Shore Broadcasting ("West Shore"). Schaberg also requested modification of his construction permit for Station WTHM, Channel 240A, to specify operation on Channel 240C2, and West Shore requested modification of its license for Station WKZC, Channel 240A, to specify operation on Channel 235C3. Schaberg and West Shore filed comments supporting their respective proposals. ODON Communications Group I, Limited Partnership ("ODON"), filed comments. Schaberg and Sheboygan County Broadcasting Co., Inc. ("Sheboygan Broadcasting"), filed reply comments.

2. ODON proposes a new site for Channel 240C2 at Glen Arbor to avoid a short spacing to the proposed upgrade of Channel 240A to Channel 240C3 at De Pere, Wisconsin, in MM Docket 89-282. *See Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 4970 (1989). ODON believes that the site restriction on Channel 240C2 at Glen Arbor, coupled with a "comprehensive resolution" proposed in MM Docket 89-282, will promote accommodation of all proposals in both dockets.

3. Schaberg opposes the additional site restriction on Channel 240C2 at Glen Arbor. Schaberg argues that from ODON's proposed site, he could not provide shadow-free service to Glen Arbor. He believes that he could not obtain FAA or FCC approval for a tower of the height needed to serve the entire community at the new site. To remove the conflict with the proposed DePere allotment, Schaberg proposes the substitution of Channel 238C2, rather than Channel 240C2, for Channel 240A at Glen Arbor. According to Schaberg, Channel 238C2 can be used at the current construction permit site for Channel 240A provided Canadian concurrence is requested as a short spaced allotment.

4. Sheboygan Broadcasting, licensee of Station WWJR(FM), Sheboygan, Wisconsin, and a party to MM Docket 89-282, filed comments stating that the instant proceeding is not related to MM Docket 89-282 and can be resolved without reference to ODON's "comprehensive resolution" in MM Docket 89-282. Sheboygan Broadcasting supports Schaberg's proposal to allot Channel 238C2 to Glen Arbor in lieu of Channel 240C2.

5. We have reviewed all the pleadings before us in this proceeding and find that the public interest would be served by providing expanded FM services in Glen Arbor and Scottsville. A staff engineering analysis confirms that there would be a line of sight problem to Glen Arbor from ODON's suggested site for Channel 240C2. However, Channel 238C2 can be substituted for Channel 240A at Glen Arbor at Schaberg's proposed site,[1] thereby removing any conflict with the DePere proposal in MM Docket 89-282. Channel 235C3 can be substituted for Channel 240A at Scottsville, Michigan, in compliance with the Commission's spacing requirements, at West Shore's proposed site.[2] Since Glen Arbor and Scottsville are located within 320 kilometers (200 miles) of the U.S. - Canadian border, Canadian concurrence has been obtained for these allotments. Concurrence for the allotment of Channel 238C2 at Glen Arbor has been obtained as a specially negotiated short spaced allotment. [3]

6. In accordance with Section 1.420(g) of the Commission's Rules, we will modify the license for Station WKZC, Channel 240A, Scottsville, Michigan, to specify operation on Channel 235C3, since no other expressions of interest in the allotment have been filed. We will also modify the construction permit for Station WTHM, Channel 240A, Glen Arbor, Michigan, to specify operation on Channel 238C2.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Glen Arbor, Michigan	238C2, 251A
Scottsville, Michigan	235C3

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WTHM, Channel 240A, Glen Arbor, Michigan, IS MODIFIED to specify operation on Channel 238C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WKZC, Channel 240A, Scottsville, Michigan, IS MODIFIED to specify operation on Channel 235C3 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 238C2 at Glen Arbor are 44-53-25 and 85-59-59.

[2] The coordinates for Channel 235C3 at Scottsville are 44-04-40 and 86-25-00.

[3] Since the substitutions at Glen Arbor and Scottsville are made as a result of a petition for rule making filed prior to October 2, 1989, Schaberg and West Shore may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-233

In the Matter of

Amendment of Section 73.202(b),	RM-7089
Table of Allotments,	RM-7546
FM Broadcast Stations.	
(Garberville and Yuba City, California)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 5 FCC Rcd 2815 (1990), issued in response to a petition filed by Eric R. Hilding (petitioner) proposing the allotment of Channel 280C1 to Garberville, California, as that community's second local FM service. Petitioner filed comments in support of the *Notice*. Ridge L. Harlan ("Harlan"), licensee of Station KXCL(FM), Channel 280A, Yuba City, California, filed a counterproposal requesting the substitution of Channel 280B1 for Channel 280A at Yuba City and modification of his license accordingly.[2] Additionally, Harlan proposes the allotment of Channel 280C3 or Channel 279C1 at Garberville in lieu of Channel 280C1. No other comments were received.

2. The requests to use Channel 280C1 at Garberville and 280B1 at Yuba City are mutually exclusive since the communities are separated by less than the required minimum distance of 233 kilometers (144 miles) between co-channel Class B1 and C1 allotments. We have confirmed that while Channel 280C1 at Garberville would preclude Station KXCL(FM) from upgrading its facilities on Channel 280B1 at Yuba City, Channel 279C1 can be allotted to Garberville to satisfy petitioner's desire to provide a second local FM service to that community.[3] Channel 279C1 can be allotted to Garberville in conformity with the minimum distance separation requirements of the Commission's Rules,[4] without the imposition of a site restriction. Additionally, Channel 280B1 can be allotted to Yuba City at the petitioner's suggested site, located 19.2 kilometers (11.9 miles) west of the community,[5] consistent with the minimum distance spacing requirements specified in Section 73.207(b) of the Commission's Rules.

3. We believe the public interest would be served by the allotment of Channel 279C1 to Garberville, California, and the substitution of Channel 280B1 for Channel 280A at Yuba City, California, thereby providing a second local FM service at Garberville and an expanded coverage FM service at Yuba City. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will modify herein the license of Station KXCL(FM) to specify operation on Channel 280C1 in lieu of Channel 280A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Garberville, California	279C1,284C2
Yuba City, California	280B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Ridge L. Harlan for Station KXCL(FM) IS MODIFIED effective **February 25, 1991,** to specify operation on Channel 280B1 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. The window period for filing applications for Channel 279C1 at Garberville, California, will open on **February 26, 1991,** and close on **March 28, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Yuba City, California, has been added to the caption.

[2] Public Notice of the counterproposal was given November 16, 1990, Report No. 1829.

[3] We did not consider Harlan's alternate proposal to allot Channel 280C3 at Garberville since no interest in its use was expressed.

[4] Coordinates used for Channel 279C1 at Garberville are 40-05-54 and 123-47-36. Since this allotment is made as a result of a petition for rule making filed prior to November 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[5] Coordinates used for Channel 280B1 at Yuba City, California, are 39-12-21 and 121-49-11. The spacing requirements for the Yuba City proposal are based on those specified in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), which, *inter alia*, increased the maximum power for Class A facilities to 6 kW and adjusted the minimum distance separations accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-604

In the Matter of

Amendment of Section 73.202(b), RM-7049
Table of Allotments,
FM Broadcast Stations.
(Gordonsville and Orange, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 26, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Radio Virginia Limited Partnership, licensee of Station WJMA-FM (formerly WVJZ-FM) ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 47 (1990), proposing the reallotment of Channel 255A from Orange to Gordonsville, Virginia, as the community's first local service. Petitioner also requested modification of its license to specify the change of community. Petitioner subsequently filed a request for withdrawal of its petition for rule making.[1]

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal.

3. Accordingly, IT IS ORDERED, that the petition for rule making of Radio Virginia Limited Partnership, seeking reallotment of Channel 255A from Orange to Gordonsville, Virginia, and modification of petitioner's license for Station WJMA-FM to specify the change of community, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner states that it received no money or other consideration in exchange for withdrawing its expression of interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-410

In the Matter of

Amendment of Section 73.202(b), RM-7354
Table of Allotments,
FM Broadcast Stations.
(Pickford, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Leon B. Van Dam ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5514 (1990), requesting the allotment of Channel 288A to Pickford, Michigan, as that community's first local FM service. Petitioner filed comments supporting the allotment. No other comments were received.

2. The *Notice* requested that petitioner furnish information to demonstrate that Pickford has the social, economic and cultural indicia to qualify it as a community for allotment purposes. The *Notice* indicated that Pickford is listed in the *Rand McNally Commercial Atlas* as having a population of 500 persons, as well as a post office, zip code and a bank. Petitioner states that Pickford is in one of the fastest growing areas in the State of Michigan and that the 1990 Census preliminary figures show an 18.2% growth in Chippewa County, where Pickford is located. Further, petitioner states that Pickford has its own public school system (kindergarten through 12th grade), churches, civic organizations, and a shopping area, and offers public services and government functions. Petitioner notes that Pickford is served by the Chippewa County International Airport, which is the only major airport in the eastern half of the Upper Peninsula. Petitioner provides a letter from the Eastern Upper Peninsula Regional Planning and Development Commission indicating that this area of Michigan has been neglected in terms of radio news coverage, promotion of local activities and events and that a radio station dedicated to serve Pickford and the surrounding area would be a tremendous asset.

3. We believe that petitioner has provided us with sufficient indicia to conclude that Pickford is a community for allotment purposes. It is an identifiable population grouping with businesses and community organizations which identify themselves with the residents of Pickford. *See Laughlin, Nevada*, 2 FCC Rcd 6267 (1987).

4. Channel 288A can be allotted to Pickford in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Since Pickford is located within 320 kilometers (200 miles) of the U.S. - Canadian border, Canadian concurrence has been obtained for this allotment.

5. We believe the public interest would be served by the allotment of Channel 288A to Pickford, Michigan, since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Pickford, Michigan	288A

6. The window period for filing applications will open on **February 26, 1991,** and close on **March 28, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 288A are 46-09-30 and 84-21-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-649

In the Matter of

Amendment of Section 73.606(b), RM-7563
Table of Allotments,
Television Broadcast Stations.
(Roseburg, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KMTR, Inc. ("petitioner"), requesting the allotment of Channel 46 to Roseburg, Oregon, as the community's third local commercial television allotment.

2. Roseburg (population 16,644), seat of Douglas County (population 93,748), is located in west central Oregon, approximately 264 kilometers (164 miles) south of Portland, Oregon.[1] Channels 4 and 36 are allotted to Roseburg. Station KPIC-TV is licensed on Channel 4, and there are two applications pending for Channel 36, filed by petitioner (BPH-900413KH) and Metrocom of Oregon (BPH-881021KG). Petitioner states that it will apply for Channel 46 as a satellite of Station KMTR, Eugene, Oregon, should it be unsuccessful in the comparative hearing for Channel 36. Alternatively, petitioner states that if Channel 46 is allotted on an expedited basis, it may be possible for either it or Metrocom of Oregon to amend their pending Channel 36 application to specify the new channel. Petitioner submits that the Commission has accepted such conditional expressions of interest in the past, citing *Las Vegas and Paradise, Nevada*, 57 R.R. 2d 1433 (1985). Petitioner also states that the allotment of Channel 36 to Roseburg is consistent with *Revision of FM Assignment Policies and Procedures*, 90 F.C.C. 2d 88 (1982), allowing the allotment of an additional channel to avoid a comparative hearing.

3. We believe the public interest would be served by proposing the allotment of Channel 46 to Roseburg, Oregon, since it could provide the community with its third local commercial television service. We find that petitioner's conditional statement of intent to apply for the channel to be acceptable for purposes of seeking comments on the proposal. However, we note that we would permit either applicant for Channel 46 to amend its application to specify the new channel, thereby granting that applicant cut-off protection, only if there were no other expressions of interest in the allotment or if there was an additional television channel available to accommodate the expressions of interest.[2] *See Notice of Proposed Rule Making (Copeland, Kansas)*, 4 FCC Rcd 8490 (1989). Channel 46 can be allotted to Roseburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.5 kilometers (10.3 miles) south to avoid the Portland "freeze" area.[3] *See Order*, 52 FR 28346, July 29, 1987.

4. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Roseburg, Oregon	4+, 36	4+, 36, 46+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 4, 1991**, and reply comments on or before **March 19, 1991**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Crigler, Esq.
James E. Dunstan, Esq.
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] A Commission engineering analysis has determined that Television Channels 25, 52, 57, 58, 59, 62, and 63 may be available for allotment to Roseburg in the event that additional expressions of interest are filed for Channel 46.

[3] The coordinates for Channel 46 at Roseburg are North Latitude 43-04-15 and West Longitude 123-23-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-650

In the Matter of

Amendment of Section 73.202(b), RM-7545
Table of Allotments,
FM Broadcast Stations.
(Augusta, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Gregory Ray Steckline ("petitioner") requesting the substitution of FM Channel 283C2 for Channel 283A at Augusta, Kansas. Petitioner also requests modification of his construction permit (BPH-880727MO) for Channel 283A to specify Channel 283C2.[1] Petitioner submitted information in support of the proposal and expressed his intention to apply for the channel.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal could provide Augusta with a wide coverage area FM station. Channel 283C2 can be allotted to Augusta, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules at a site 11.4 kilometers (7 miles) northeast of the community.[2] The site restriction will prevent a conflict with Station KMYZ-FM, Channel 283C1, Pryor, Oklahoma, and to a counterproposal to add Channel 230C2 at Andover, Kansas, in MM Docket No. 89-429. We shall also propose to modify petitioner's construction permit for Channel 283A to specify Channel 283C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Augusta or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the above, the Commission believe it appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Augusta, Kansas	283A	283C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James P. Riley
Lonna A. Thompson
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2679
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner was granted a construction permit in MM Docket No. 90-292, FCC 90M-3230, released October 15, 1990.

[2] The coordinates for Channel 283C2 at Augusta are 37-46-21 and 96-54-15. Petitioner's proposed site 13 kilometers (8.1 miles) north of Augusta (37-48-11 and 96-57-24) is short spaced to a counterproposal to add Channel 230C2 at Andover, Kansas, in MM Docket No. 89-429. To avoid the conflict and proceed with petitioner's request, we have used a reference site 11.4 kilometers (7 miles) northeast of Augusta.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-264

In the Matter of

Proposals to Reform the
Commission's Comparative
Hearing Process to Expedite
the Resolution of Cases

REPORT AND ORDER

Adopted: December 13, 1990; Released: December 21, 1990

By the Commission: Commissioner Quello issuing a statement.

1. By this *Report and Order*, the Commission intends to substantially reduce the time consumed in the conduct of comparative hearings and agency review in cases involving applicants for new broadcast facilities. The *Notice of Proposed Rule Making* in this proceeding solicited comment on ways to expedite the Commission's comparative hearing processes for new applicants. 5 FCC Rcd 4050 (1990). Comments were filed by the Administrative Conference of the United States (ACUS); professional organizations, including the Federal Communications Bar Association (FCBA) and the American Women in Radio and Television (AWRT); public interest groups such as the National Association for the Advancement of Colored People, *et al* (NAACP) and Black Citizens for a Fair Media, *et al* (BCFM); law firms filing on their own behalf or on behalf of their clients; and applicants, licensees and individuals filing on their own behalf.[1]

I. SUMMARY OF CONCLUSIONS

2. The *Notice* observed that during the process of selecting among otherwise qualified applicants for new broadcast facilities the public is deprived of a valued service, and the ultimate licensee is deprived of the opportunity to provide that service. We therefore proposed a number of procedural and organizational strategies intended to reduce the amount of time consumed by this process. We also fully recognize that the comparative hearing process serves the important goal of selecting the best qualified applicant.[2] After balancing these considerations, we are convinced that unnecessary delay in the comparative hearing process can be substantially reduced while still preserving the fundamental fairness and public interest benefits of our proceedings. Accordingly, the actions taken herein are designed to expedite comparative hearing cases by:

(I) Encouraging more and/or earlier settlements through earlier payment of the hearing fee, modifying the *Ruarch* policy, and providing for settlement conferences before settlement judges;

(II) Expediting discovery through the use of standardized document production orders and integration statements, and imposing time limits on discovery;

(III) Expediting hearings by encouraging written proceedings and establishing time guidelines for the various phases of the hearing and the preparation of the ID; and

(IV) Expediting appeals through limitations on oral argument before the Review Board and imposing time guidelines on the completion of the review process.

II. ENCOURAGING SETTLEMENTS

3. Settlements can be a significant factor in expediting the new service, and most commenters support the objective of encouraging settlements. BCFM and K&N, however, suggest that encouraging settlements may be inconsistent with the primary purpose of the comparative hearing process, selection of the best qualified applicant.[3] We recognize that, in a particular case, a settlement may result in a grant to an applicant that might not be considered "best qualified" under our comparative criteria. However, the settlement process takes place within the context of the comparative criteria, in that an applicant's evaluation of its own comparative standing, as well as that of its competitors, has an impact on its decision to offer or accept a settlement or to persevere to the end of the process. Thus, any reduction in the comparative merits of an applicant that is granted after settlement, as opposed to one that is granted in a case that is not settled, is likely to be marginal, if it occurs at all. Further, settlements expedite the provision of new broadcast service to the public and permit government resources to be turned to the more expeditious resolution of those cases that remain. In these circumstances, we think the benefit of conducting the hearing is outweighed by the public interest benefits of settlement.

A. The Hearing Fee

4. Experience indicates that the opportunity to avoid payment of the hearing fee provides an incentive to conclude settlements before that fee must be paid. Moreover, particularly in proceedings that involve numerous applicants, the fee requirement weeds out non-serious applicants, and parties may prefer to wait until the payment of the hearing fee "separates the wheat from the chaff" before engaging in settlement talks. To enhance these salutary effects of the hearing fee on settlements, the *Notice* proposed to require payment of the fee earlier than is currently required.

5. Most commenters addressing the issue agree that the earlier payment of the hearing fee would have a beneficial affect on the comparative hearing process. Vince Lee Broadcasting, Ltd., J. M. Broadcasting, Ltd., and Henderson Broadcasting of Memphis, Inc. observe that it is only in the rarest cases that settlement discussions can get anywhere before the serious applicants can be separated from the speculators through payment of the hearing fee. Radio New Jersey (RNJ) would require that the fee be paid with the filing of the application, but the FCBA and Michael J. Hirrell suggest later dates, approximately 60 days after the filing of the last filed mutually exclusive application. The FCBA would provide for refunds of the

hearing fee if the case is settled prior to the Notice of Appearance deadline or to applicants that withdraw from the case before that filing. RNJ believes that the fee should be refunded only where the applicant is unopposed or is dismissed, because refund of the fee on settlement, or even inclusion of the fee amount in the calculation of expenses reimbursable at settlement, dilutes the beneficial effect of the fee requirement. RNJ and Caldwell Communications Corp. (Caldwell) urge the Commission to seek an increase in the hearing fee.[4] On the other hand, AWRT believes that any increase in the hearing fee would impose additional barriers to participation in the comparative process.[5] Walker, Bordelin, Hamlin, Theriot and Hardy (the Hardy Group) and AWRT believe that the HDO performs an important role in settlements by identifying the applicants and issues, thereby facilitating evaluation of the comparative standings of the participants. AWRT also opposes payment of the fee before the HDO, believing that such a requirement would delay the issuance of the HDO.

6. We believe that the suggestion that the hearing fee be collected shortly after the filing of the last filed mutually exclusive application has merit. In each broadcast service, a public notice announces the acceptance of mutually exclusive applications and establishes a deadline for filing petitions to deny those applications.[6] We will use that same public notice to establish a date for paying the hearing fee. The use of that date, as opposed to a date established in a pre-designation letter, will not delay the processing of applications or the issuance of HDOs. Also, applicants will have adequate time to study the competing applications, engage in settlement talks, and make a decision as to whether they wish to proceed with their applications.[7] Moreover, with the identification of mutually exclusive applications in the public notice of acceptance for filing, it is clear that the identified applications have been grouped together, and, after processing by the staff, those applications will be designated for hearing. Thus, our decision to collect the hearing fee prior to the HDO is within the discretion granted the Commission to adopt appropriate rules to collect the fees mandated by Congress. *See* 47 U.S.C. § 158(f).[8] Accordingly, we will amend our rules to provide that the hearing fee in broadcast comparative cases will be due approximately 30 days after the petition to deny deadline, on a date established in the public notice announcing the acceptance for filing of mutually exclusive applications.

7. *Hearing Fee Refunds.* Although the fee legislation permits collection of the hearing fee prior to designation of a case for hearing, we do not believe that Congress intended that the Commission should retain hearing fees paid by applicants that are not designated for hearing. Thus, refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing. After an applicant has been designated for hearing, the hearing fee may also be refunded under the circumstances provided for in section 1.1111(c) of our rules. 47 C.F.R. § 1.1111(c).[9]

8. *Transition Period.* We will make the transition from our current rule (payment of the hearing fee with Notices of Appearance) to the new rule (payment prior to the HDO) in the following manner. For all commercial broadcast applications that have not been placed on a "B" cut-off list released prior to February 13, 1991 (the effective date of the rule change), the date for making payment of the hearing fee will be established in the public notice setting the "B" cut-off deadline. All commercial broadcast applications that have been placed on a "B" cut-off list released prior to February 13, 1991, will be required to pay their hearing fee by March 15, 1991, unless such applications are designated for hearing before that date. All applicants designated for hearing before March 15, 1991, should pay their hearing fee with their Notices of Appearance.[10]

B. Pre-Designation Settlements

9. The *Notice* in this proceeding proposed to specify "settlement advocates" to encourage applicants to settle the case before the HDO. It also sought comments on whether the pre-designation settlement process would be enhanced by requiring all pending applicants that have not supplied the additional information on financing and integration proposals now required by FCC Form 301 to provide that information in an amendment to their applications.[11] To further encourage settlements through mergers, we sought comment on whether we should permit the merged applicant to enjoy the comparative advantages achieved by virtue of the merger.[12]

10. The FCBA supports the settlement advocate process, but it opines that it should be purely voluntary. RNJ and Glen Gerberg suggest that conferences with settlement advocate must include principals, and they should be off the record. On the other hand, AWRT opposes the settlement advocate proposal, arguing that settlements are more likely without FCC presence. The FCBA and AWRT would provide all pending applicants that filed on the old Form 301 60 days to file the financial and integration information now required on the application. RNJ would require all applicants to submit their written direct case with their applications. The FCBA is concerned that the settlement advocate process not be used as a "bludgeon" that penalizes applicants that want to pursue their applications through hearing. Thus, the FCBA opposes comparative upgrading through mergers.

11. Although the settlement advocate process may result in some increase in the number of cases that are settled before designation, it may also delay the processing of applications that partake of the process. On balance, we do not believe that the anticipated increase in pre-designation settlements would be worth the staff resources that would have to be devoted to the process and the resulting delay in processing. Accordingly, we will not implement the pre-designation settlement advocate process. We are also persuaded that permitting merged applicants to upgrade their comparative standing by virtue of the merger would only lead to comparative gamesmanship. Finally, with regard to the financial and integration information now called for on the Form 301, we recently denied a petition for reconsideration that argued that the new requirements should be applied to applications filed before June 26, 1989. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, *recon. denied*, 5 FCC Rcd (1990). As that decision fully considered the salutary effect of the requested change on the pre-designation settlement process, we shall not revisit the matter in this proceeding.

C. Settlement Conferences

12. To encourage more settlements after designation but before trial, the *Notice* proposed that applicants should participate in an off-the-record settlement conference before a "settlement judge." *See* Joseph and Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 24-26 (1988). To facilitate this process in cases involving mergers, we proposed to permit the settlement judge to recommend that the merged applicant could take full advantage of the comparative merits that may flow from the merger. To add monetary incentives to the process, we also proposed to permit a settlement judge to recommend a refund of up to half the hearing fee in cases that are settled in this manner.

13. ACUS and the FCBA support the use of settlement judges in comparative proceedings. ACUS asserts that frank, open, off-the-record, confidential and even *ex parte* discussions are important parts of the process. Even if settlements are not forthcoming, ACUS opines that the process may greatly reduce the scope of the parties' disagreements. The FCBA suggests that the settlement judge process be a voluntary one. RNJ suggests that the settlement judge process should take place after the filing of motions to enlarge issues, when, in the commenter's opinion, the settlement judge will be in a better position to make an informal assesment of the applicants.

14. AWRT, Hirrel, and Cohen and Berfield (C&B) oppose the settlement judge process. AWRT believes that settlements are more likely if the FCC is not involved in the process and that our present procedures requiring the filing of Notices of Appearance, discovery requests and motions to enlarge issues do not provide adequate time after the HDO to explore settlements. It would suspend all procedural dates for a 60 day period after the HDO for settlement discussions. The applicants would be required to hold at least one meeting and submit three reports on the status of settlement negotiations during that period. Notices of Appearance would be filed on the 60th day, and motions to enlarge, modify or delete issues would be due 30 there after. The Hardy Group proposes a similar, but shorter, "settlement window" between the HDO and the first pre-hearing conference. Hirrel contends that applicants are already aware of settlements, and additional procedures to focus on the possibility of settlements will only delay the decisional process. C&B opines that limits on the amount of settlement payments would severely reduce the motive to settle, and the proposed "institutionalized persuasion" would likely do nothing more than divert staff resources. The commenter further suggests that forced settlements are bad policy in that they may result in unstable licensees comprised of antagonistic parties.

15. The FCBA, RNJ, and Hirrel oppose any rule that would permit the settlement judge to allow comparative upgrading. AWRT would permit comparative upgrades resulting from partial settlements by the Notice of Appearance (NOA) date, but AWRT, Hirrel, and RNJ oppose partial fee refunds for cases settled in the settlement judge procedure. Koteen and Naftalin (K&N) suggest that, where there are significant differences among applicants, the judge should consider those differences and only approve settlements that achieve the goal of best practicable service.

16. After considering the comments, we have decided to make settlement judges available to applicants on a voluntary, experimental basis.[13] Where all parties believe that a settlement judge might facilitate settlement efforts, a request for the assignment of a settlement judge should be submitted to the presiding judge who will forward it to the Chief Administrative Law Judge. In the Chief ALJ's discretion, a settlement judge will be assigned. After reviewing the applicants' proposals, the settlement judge will meet with the applicants individually and/or in concert to explore a potential settlement of the matter.[14]

17. As with pre-designation mergers, we will not permit comparative upgrading of applications that enter partial settlements through the settlement judge process. While the prospect of such upgrading may encourage participation in the process, it may also encourage comparative gamesmanship and the filing of speculative applications. Similarly, we will not refund all or part of the hearing fee paid by the applicants that participate in the process. To do so would only decrease incentives to settle the case even earlier. In this regard, we believe that the prospect of avoiding the costs and delays of litigation provide adequate incentives to settlements.

D. The Ruarch Policy

18. In *Ruarch Associates*, 103 FCC 2d 1178 (1986), the applicant had committed itself to divest a co-owned station to avoid a comparative demerit. In approving the settlement submitted after the ID and a Review Board decision in the case, the Commission relieved the applicant of that commitment.[15] The *Notice* asked whether we should reverse *Ruarch Associates* and its progeny. We also sought comment on appropriate means to ensure the future adherence to promises made in applications for purposes of enhancing an applicant's comparative standing under diversity and integration criteria.

19. MAP, Hirrel, and RNJ believe the *Ruarch* policy should be overturned, and applicants should be held to their comparative commitments. On the other hand, AWRT and the law firm of Pepper and Corrazini (P&C) argue that the policy should be retained because it facilitates settlements. The FCBA takes no position on the elimination of the *Ruarch* policy, but it suggests that parties should be permitted to withdraw divestiture and integration proposals only if the proceeding is resolved by a global settlement on or prior to the hearing exhibit exchange. K&N suggests that applicants requesting approval of a settlement should indicate which promises will survive the settlement, and the presiding judge should consider this in his ruling.

20. The FCBA contends that the lack of post-grant enforcement of comparative promises has been a contributor to abuses of the Commission's processes. Although many false and questionable commitments are exposed at hearing, the FCBA notes that others remain hidden until the applicant is granted, and, to enforce adherance to commitments in applications, the FCBA proposes that we select a runner-up who would acquire the construction permit in the event that the winner fails to materially honor its hearing commitments during construction. After construction, the license would be conditioned on fulfilling the obligations on which its comparative superiority was based for a period of three years. Hirrel would also impose a 3-year holding period on licenses, during which time the applicant would be required to keep all comparative promises and report such compliance in their annual ownership reports. MAP suggests that an applicant's failure to fully comply with its comparative com-

mitments should be grounds for a renewal hearing or adding an issue in another proceeding involving the same applicant.

21. It is possible that the *Ruarch* policy may encourage inflated comparative commitments, which in turn affect settlement negotiations. Retaining the policy, however, may provide an added incentive to settle. In striking a balance between these conflicting considerations, we believe there is merit to the FCBA proposal to permit the successful applicant in a "global" settlement to withdraw divestiture and integration proposals where the settlement is entered into early in the hearing process. Thus, where a settlement of the case is entered into and filed with the presiding judge on or before the NOA date, the judge may entertain and grant a request to relieve the successful applicant of divestiture and integration proposals.[16] The notice of appearance deadline was selected as the cut-off point because it is the date on which applicants will be exchanging detailed information on their integration proposals. *See* paragraph 27, below. In settlements reached after the notice of appearance deadline, the successful applicant will be expected to fulfill its divestiture and integration proposals.

22. We also agree with the commenters that some oversight of applicant adherence to comparative promises is appropriate. We believe, however, that ensuring at least one full year's compliance with such promises is sufficient to test the applicant's *bona fides* and to discourage inflated commitments.[17] Thus, a new section 73.1620(g) will require permittees authorized out of the comparative hearing process, including those granted after a settlement, to file a statement with their applications for a license to cover their permits (FCC Form 302), identifying any deviations from the divestiture and/or integration promises contained in their applications, unless they have been relieved of those obligations under the policy enunciated above. A similar statement will be required to be filed on the first anniversary of the commencement of program tests.[18] Program tests generally commence within ten days of the filing of the Form 302. *See* 47 C.F.R. § 73.1620(a). The Commission will take appropriate enforcement action in any case in which deviations from these comparative proposals indicate that the proposals, as made to the Commission, consititute a misrepresentation.

III. EXPEDITING THE HEARING PROCESS

A. Discovery

23. We proposed to commence discovery with the issuance of the HDO, permit 60 days for the conclusion of discovery, and limit the discovery tools available to the parties. Generally, the commenters view discovery as an essential element of the hearing process, necessary to expose exaggerated or sham proposals. Hirrel suggests that restrictions on discovery will encourage speculation and reduce the quality of decisions. P&C notes that, without discovery, the Commission would have to take all proposals at face value. In the same vein, K&N contend that applicants are less likely to fictionalize proposals that will be tested in discovery. Although FCBA, K&N, and MAP agree that the time allowed for discovery can be shortened, they generally argue that discovery tools should not be limited, and a number of commenters including the FCBA note any limitation on the time allowed for discovery must also consider the effect of issue enlargement and the need to conduct additional discovery to explore any new issues.

24. To shorten the time consumed by discovery, the FCBA proposes that we adopt a standard document production order identifying those basic threshold documents that every party would be required to produce within 20 days of the HDO. Any requests for additional documents should be filed within 10 days of the initial exchange. If a party claimed a privilege with regard to the documents, motions to compel should be filed within 10 days of production date, and the presiding judge should rule on the motions within 20 days. Under this scheme, the production of documents should be completed within 60 days of the HDO; depositions would consume the next 60 days, and discovery would be completed within 120 days of the HDO. To further facilitate the process, the FCBA would require the submission of an applicant's integration statement, in a standardized format, on the same date as the documents must be initially produced. K&N suggest that we require the exchange of direct cases 30 days after HDO. Then, discovery would be concluded 60 days later.

25. We are convinced that substantial time savings can be achieved in the discovery phase of comparative cases by commencing discovery with the issuance of the HDO. Thus, we will amend section 1.325 of our rules to incorporate a standardized document production order for use in comparative proceedings, requiring applicants to make the enumerated documents available to their competitors, or object to their production on the basis of a claim of priviledge, within 20 days after the issuance of the HDO, *i.e.*, concurrently with the filing of their notices of appearance.[19] Any motions to compel the production of documents for which a privilege has been asserted should be filed within 5 working days, and the presiding judge would be expected to dispose of any such motions within 10 calendar days. To facilitate this process, we encourage judges to convene a pre-hearing conference to hear argument on and dispose of these motions to compel.

26. As suggested by the FCBA, the new rule will require applicants to produce documents in the following categories: (1) all formation and organizational documents, including articles of incorporation, by laws, partnership agreements, voting rights, proxies, and any amendments to the foregoing documents; (2) all minutes of meetings relating to the application; (3) all documents relating to the rights or plans of persons or entities to purchase an interest in the applicant or of current owners to alienate their interests; (4) all documents relating to pledges, mortgages, security interests, or other encumbrances of any kind with respect to the applicant; (5) all bank letters and other financing documents with the dollar amounts unexpurgated; (6) all documents relating to the applicant's proposed transmitter site; (7) all documents relating to communications by proposed integrated principals with respect to their proposed participation in the management of the station and the disposition of their current employment; (8) all documents relating to prior integration pledges made by principals who propose to be integrated into the management of the station at issue; (9) all documents relating to communications by and between principals of the applicant concerning the application, including communications between active and passive principals; (10) representative documents relating to enhancement credits and preferences sought by the applicant's principals for local residence, civic participation,

past broadcast experience, minority/female status, and the like; (11) all documents relating to commitments to divest other media interests; and (12) all documents that identify or describe the principals who are responsible for completing the application, arranging financing, obtaining the applicant's transmitter site, publishing the required notices, establishing the local public inspection file, and retaining lawyers, engineers, and other professionals.

27. The HDO will also require applicants to file and exchange a standardized integration statement on the same date. That statement shall include the following information: (1) a description of the applicant's ownership structure (whether it is an individual, a partnership, a limited partnership or a corporation, and if it is a corporation, whether it has both voting and non-voting stock); (2) the ownership percentage of each owner; (3) the identity of the owners who will work at the proposed station, what titles and duties they will have, how many hours they will work per week, and how they will reconcile any current business interests or employment with that commitment to the station; (4) all other media interests held by the persons identified under (2), above; (5) whether the integrated owners will claim credit for minority or female ownership and if so, specifically on what basis; (6) whether the integrated owners will claim credit for local residence and civic involvement in the city of license or service area and if so, specifically on what basis (including a detailed chronology of past residence and a description of civic activities and their duration); (7) whether the integrated owners will claim credit for previous broadcast experience and if so, provide a detailed list of the stations they worked at, the titles and duties they had, and the years in which they were so employed; and (8) whether the applicant will claim a daytimer preference and if so, specifically on what basis. With the early provision of the information required in the standardized document production order and the uniform integration statement, we would expect that the remainder of the discovery process could be expedited.

28. We are also adopting the FCBA's suggestion that parties be permitted to request additional documents without making a "good cause" showing and to eliminate the requirement that ALJs rule on unopposed document requests. Parties may request additional relevant documents, not called for in the standardized production order, at any time after the issuance of the HDO, but initial supplemental requests for documents must be filed no later than ten days after the notice of appearance deadline. Any supplemental document requests must be complied with or objected to within ten calendar days. Any motions to compel the production of documents for which a privilege has been asserted should be filed within five working days of the document production date, and the presiding judge would be expected to dispose of any such motions within 10 calendar days. To facilitate this process, we encourage judges to convene a pre-hearing conference to hear argument on and dispose of these motions to compel.

29. Oral depositions would generally be scheduled after the initial document production. As suggested by the FCBA, the rules are amended to require that all applicants be prepared to make their active and passive owners available for such depositions after the notice of appearance deadline, and the 21 day notice provision for depositions will not apply to depositions of these applicant principals. *See* 47 C.F.R. § 1.315. Further, depositions of these principals will be held in Washington, D.C. or in the proposed community of license, at the deponents' option, unless all parties agree to some other location. In this manner, we believe that discovery in the routine comparative case can be completed within 90 days of the issuance of the HDO. However, we recognize that there will be cases in which more time is needed, and the administrative law judges have the discretion to permit discovery to extend beyond that time limit in unusual cases or when the issues have been enlarged.

30. In order to facilitate discovery on new issues added to a proceeding in response to petitions to enlarge issues, we will amend section 1.229 of our rules to require that a motion to enlarge identify those documents the moving party wishes to have produced and any other discovery procedures the movant wishes to employ. If the motion is granted, the ALJ will simultaneously rule on the additional discovery requests. Such additional discovery will be scheduled to be completed within 30 days of the action on the motion, unless the requested discovery is directed against persons who are not parties to the proceeding. In such circumstances, additional time will be necessary to provide required notice to persons against whom discovery is sought. Moreover, we note that section 1.229 places the burden of establishing that the enlargement of issues is warranted on the moving party and sets forth pleading standards that must be met in moving to enlarge issues. To avoid the need to try unnecessary issues, we expect ALJs and the Review Board to strictly adhere to the standards established in the rule.

B. The "Anax" Doctrine.

31. In *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), we allowed applicants to exclude limited partners (and the owners of non-voting stock) from the calculus by which we determine the comparative credit for integration of ownership and management (as well as for diversity). The *Notice* recognized that active/passive ownership structures that take advantage of the *Anax* doctrine had spawned lengthy litigation, and it asked whether the Commission should eliminate or modify that doctrine to curtail such litigation.

32. The FCBA and AWRT take no position on the elimination of the *Anax* doctrine, but they both suggest that, if it is eliminated, the change should not apply to pending applications. This latter position is shared by numerous commenters, including applicants that have proposed a two-tier ownership structure and prosecuted their applications through hearing, who argue that it would be unfair to apply any change in the *Anax* doctrine to applicants that expended time and money in reasonable expectation that certain policies would govern their application. Hirrel and C&B argue that the *Anax* doctrine should be retained, but K&N and RNJ assert that it should be eliminated.

33. A number of parties recommend changes in the *Anax* doctrine. The FCBA suggests that applicants relying on *Anax* should have the burden of proving the passivity of investors, but the Commission should recognize that even fully insulated passive investors may undertake a more active role in the formation and prosecution of an application than is permitted by Commission case law. *See Coast TV*, 4 FCC Rcd 1786 (1989). MAP, NAACP, and the Congressional Black Caucus argue that *Anax* provides an important financing tool for potential minority broadcasters, and the Commission can eliminate

abuses of the *Anax* doctrine by treating integrated minority or female owners holding 80% or more of the equity in the applicant as if they were 100% owners or requiring that integrated owners hold at least a 20% equity interest in the applicant. On the other hand, C&B believes that a 20% benchmark is unrealistic, because, if the other 80% is owned by a single individual, the same active/passive questions arise, but even a 10% active participant, who is also the largest single owner should not face the same questions. To address potential abuses of the active/passive ownership structure, MAP and Hirrel would have the winning applicant certify, in its application for a license to cover the construction permit that the active owners have retained sole control. MAP also suggests that follow-up reports be submitted with the licensee's first three ownership reports, and it asserts that the Commission should rank comparative applicants so that runners-up could act as watch dogs of the passive ownership structure.

34. Upon consideration of the comments, we have decided to not eliminate or alter the *Anax* doctrine in this proceeding. The underlying premise of that doctrine is that certain passive ownership interests are not cognizable under the Commission's attribution rules, 47 C.F.R. § 73.3555 Note 2, and such interests should not dilute the integration credit available to applicants whose organization includes such nonattributable interests. That premise remains viable, and we will not overturn the *Anax* case or modify the *Anax* doctrine in this proceeding.[20] However, as suggested by several commenters, a new section 73.1620(g) will require successful applicants proposing an active/passive ownership structure to report any deviations from their proposal that active owners retain sole control of the permittee/licensee in applications for a license to cover the construction permit and again on the first anniversary of program test authority. The Commission will take appropriate enforcement action in any case in which deviations from the active/passive ownership structure indicate that the proposal, as made to the Commission, constitutes a misrepresentation.

C. Written Cases

35. Based on our experience in major market cellular comparative cases, the *Notice* proposed to require the use of written cases except in the most unusual circumstances. Parties desiring to present oral testimony or cross examine opponents on their written cases would be required to make a specific showing to the presiding judge supporting that request. All of the commenters addressing this proposal oppose limitations on cross examination in hearings. The FCBA, Hirrel, and P&C assert that the cellular comparative proceedings do not provide a basis for eliminating cross examination in broadcast cases. The commenters point out that the decisional factors in the cellular proceedings were objectively ascertainable facts, but in broadcast comparative cases, the decisional factors often turn on promises which cannot be verified or disproven without cross examination and the judges observations on a witness's credibility. Glen Gerberg suggests that cross examination by applicants' counsel should be eliminated, and all witnesses should be questioned by the ALJ only.

36. Although our experience indicates that the use of strictly written procedures can expedite the hearing process, we did not propose to preclude ALJ's from taking oral testimony. For some types of issues, it may be necessary to observe the demeanor of the witnesses to assess their credibility, and, in other instances, cross examination may be required. Section 1.248 of our rules empowers ALJs to limit oral testimony, 47 C.F.R. § 1.248, and, in the exercise of the discretion granted ALJs by that rule, we will make it clear that ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings.[21] Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance.

D. Time Guidelines

37. The *Notice* proposed time guidelines that would result in the issuance of an ID in a routine comparative case within seven months of the HDO. In comments, ACUS asserts that reasonable timetables can help reduce administrative delay, accommodating exceptional cases while not delaying routine ones. The FCBA, Hirrel, and AWRT suggest that our guidelines provide inadequate time to prepare thorough and thoughtful findings and IDs, and the FCBA points out that our guidelines do not consider the time required to resolve motions to enlarge issues. Such motions must be filed within 30 days of the publication of the HDO in the *Federal Register*, 47 C.F.R. § 1.229, but several weeks could be saved if the time ran from the release of the HDO. The FCBA would also impose strict limits on late motions, and it suggests that the judge resolve any such motions at a pre-hearing conference rather than in a written decision.

38. The FCBA recommends the following time guidelines for the hearing phase of a comparative case. Discovery would consume the first 120 days after the HDO; exhibits would be exchanged 45 days later and the hearing would commence 30 days thereafter.[22] After the hearing, parties would be afforded 45 days to file findings if there was no oral testimony, but, because of the time required to obtain transcripts of the hearing, 60 days would be permitted in cases in which there was oral testimony. The ALJ would be given between 90 and 120 days to prepare the ID. Under this proposal, the hearing phase of the case would be concluded in about 13 months. The FCBA points out that its time frame is faster than the average for cases in the federal courts (about 14 months), and it represents about a 25% reduction in the time currently consumed in the hearing phase of FCC cases.

39. Although the FCBA proposal represents some time savings, we believe that additional savings are possible, particularly in the routine case that does not involve delays associated with the enlargement of issues. Thus, we have determined that our goal should be the resolution of routine comparative cases by ID within nine months of the HDO. As noted above, the HDO would commence the discovery process by requiring the exchange of documents pursuant to a standardized document production order and the filing of uniform integration statements. The routine discovery phase of the case generally would be terminated 90 days after the issuance of the HDO. Exhibits would be exchanged 30 days after completion of discovery, and the hearing would be scheduled about 15 days thereafter.[23] The record should be closed immediately at the end of whatever hearing is necessary, and 60 days provided for the filing of proposed findings and reply

findings.[24] The ALJs should make every effort to prepare and release the ID in these routine cases within 90 days of the last pleading.[25]

40. The decision time guideline being adopted herein is the same as was accomplished, on averge, in the expedited cellular cases. We recognize that the decision times achieved in the cellular cases reflect, to some extent, the fact that the ALJs were assisted by a staff of attorneys and engineers in their writing efforts. In this regard, we note that meeting the 90-day time guideline in broadcast comparative cases will most probably require similar assistance. Thus, the Office of Managing Director will prepare a proposal to provide the ALJs with either individual writing assistants or a pool of paralegals, attorneys, and/or engineers that can assist them in preparing these decisions. We have also asked the Office of Managing Director to look into the assignment of additional administrative resources for the ALJs, to track the progress of hearing cases so that problem areas can be identified. The Chief ALJ is also directed to make appropriate efforts to expedite cases that appear to be falling behind the time guidelines.[26]

IV. EXPEDITING REVIEW

A. Eliminate Intermediate Review

41. The *Notice* sought comments on whether elimination of the Review Board would expedite the resolution of broadcast comparative cases after the ID. The commenters generally believe that the Review Board operates expeditiously and efficiently. The FCBA strongly opposes elimination, asserting that the Board functions better than any other element of the comparative process. Hirrel suggests that the time consumed before the Review Board is not unreasonable, and intermediate review is vitally important to the process of careful selection of the best applicant. The FCBA recommends that the Board's resources should be enhanced with additional Board members and staff. On the basis of these comments and the reservations expressed in the *Notice*, we will not eliminate the intermediate review function.

B. Reorganize the Intermediate Review Function

42. The *Notice* also solicited comment on the possible reorganization or modification of the two-tiered review system, including a consolidation of the Review Board and its staff with the staff that prepares adjudicatory decisions for the Commission. Moreover, because the purpose of the Review Board is to free the Commission from burdensome review functions, we proposed an amendment to section 0.361(b) of our rules to permit the Commission or any of its members to provide legal and policy guidance and advice to the Board or any of its members. 47 C.F.R. § 0.361(b).

43. The commenters addressing reorganization generally opposed our proposals. Hirrel opines that a sound result is more likely to be reached in a decision on the record alone, unswayed by policy considerations. ACUS expresses concerns that the proposed consolidation could compromise the Board's ability to process routine matters efficiently and public perception of independent review by injecting "policy" review prematurely and negating the appearance of impartial decisionmaking at the Review Board stage. The FCBA suggests that permitting Commissioners to discuss the merits of cases with Board would give the impression that decisions in comparative cases are based on politics rather than reasoned decisionmaking. MAP proposes its own reorganization plan that would increase the Board's membership and staff and delegate full reviewing authority to the Board. Under this plan, the Commission could review Board decisions on its own motion within a limited time.

44. To an extent, the commenters that oppose the consolidation plan misperceive the purpose behind that proposal. With access to the decision writing staff of the Adjudication Division, the Review Board could prepare its decisions in less time, and, if a case is appealed to the Commission, the fact that a staffer is already familiar with the record would enable the Commission to render a decision faster. Nevertheless, we have determined that the best course would be to maintain the current organization of the Board,[27] and, in consideration of the comments, we will not amend section 0.361 to permit consulations between the Commission and the Board.[28] However, to further expedite the intermediate review process, we are amending section 1.277 of our rules to further restrict the permissible length of consolidated briefs and exceptions to 25 double spaced typewritten pages. We believe that this limitation will focus the pleadings on critical questions in the case, thereby honing the issues and fostering a more efficient disposition of appeals from IDs.

C. Oral Argument

45. To expedite the review process, we proposed to limit oral argument before the Review Board and the Commission to cases involving extraordinary circumstances. The commenters generally oppose restrictions on oral argument, although the FCBA agrees that the Board should not routinely grant requests for oral argument as it does now. The commenters generally assert that oral argument serves the important function of focusing and defining key appellate issues, and it probably shortens rather than lengthens review time.

46. In 1961, Congress deleted a provision of section 409 of the Communications Act that had required the Commission to hear oral argument or exceptions from initial decisions. Thus, the Commission and the Board have the discretion not to hear oral argument. *See* S. Rep. No. 576, 87th Cong., 1st Sess. 15 (1961). Although we recognize that oral argument may, in some cases, provide valuable assistance to the reviewing authority in resolving the issues before it, the scheduling of oral argument also delays the ultimate resolution of the case. Thus, we will amend section 1.277 of the rules to provide that oral argument be allowed only where it is requested by the parties and the Board or Commission finds that it will assist in the resolution of the issues presented on appeal.

D. Time Guidelines

47. The Commission's rules currently require the Review Board to adopt a decision within 180 days after release of an ID, and section 5(d) of the Communications Act requires the Commission to conduct its business with the objective of rendering a decision in hearing cases "within six months from the final date of the hearing...." 47 U.S.C. § 155(d).[29] The *Notice* proposed internal guidelines establishing a goal of issuing final agency decisions in these comparative cases within six months of the IDs by issuing Review Board decisions within 3 months and Commission decisions 3 months thereafter. In the alternative, we sought comment on an FCBA proposal that

the Commission adopt a rule requiring that applications for review from Review Board decisions be acted upon within six months after they are filed. Under the FCBA proposal, if the application for review was not acted on in six months, it would be deemed denied, and Review Board's decision would become final. The case would then be subject to judicial review on the basis of the Review Board's decision.

48. Consistent with their view that the Review Board process is not overly time consuming, the commenters generally focus on time guidelines for Commission decisions on applications for review. The FCBA reiterated its 6-month proposal in which the Review Board decision would become final if an application for review were not acted upon by the Commission within six months of its filing. FCBA states that six months would give the Commission "ample time to consider whether applications for review present novel or important policy questions."[30] AWRT suggests a process under which applications for review would be accepted or denied within 30 to 60 days. K&N assert that the application for review should be limited to matters of policy, leaving evidentiary questions and non-policy matters to the Review Board. K&N also contend that the decision to grant review should not take more than 3 months, and, once review is granted, the Commission should call for the submission of briefs focused on the issue the Commission wishes to resolve. In the commenter's opinion, such briefs will expedite the preparation of the Commission's decision. Hirrel would eliminate the application for review process; the Review Board would issue recommended decisions; only the decision would be reviewed by the Commission, and, if the decision complies with Commission policy, the Commission would promptly issue an order adopting it. That order would be subject to appeal or reconsideration. RNJ suggests that both the Review Board and Commission should have six months to issue their decisions.

49. Upon consideration of the comments, we believe that time savings can be achieved in the resolution of these cases by the Review Board. With the elimination of oral argument in appropriate cases, the Review Board should be able to complete its consideration of routine cases within four months of the filing of exceptions, *i.e.*, approximately five and a half months after the issuance of the ID.[31]

50. As to Commission review, the Communications Act provides that parties aggrieved by a decision taken pursuant to delegated authority "may file an application for review" of that decision by the Commission and "every such application shall be passed upon by the Commission." 47 U.S.C. § 155(c)(4). It therefore appears that we could not, consistent with the application for review process established in the Act, limit the scope of applications for review solely to policy issues (as proposed by K&N) or substitute a "recommended decision" process (as proposed by Hirrel). Similarly, it does not appear that a rule providing that applications for review would be deemed denied or automatically denied satisfies the statutory requirement that they be "passed upon by the Commission." 47 U.S.C. § 155(c)(4).[32] In any event, we conclude that a commitment to disposing of applications for review within five months is more appropriate than the commenters' proposals.[33] We are amending our rules to include an express statement of this policy and a commitment to either dispose of applications for review within five months of their filing or issue an order indicating that additional time will be required in a particular case. To implement this policy, the staff is being instructed to prepare orders disposing of applications for review in routine cases and present them for Commission consideration well before the expiration of the five month period.[34]

V. OTHER PROPOSALS

51. The *Notice* proposed to give ALJs the authority to impose forfeitures, in addition to denying the application, in cases in which applicants made misrepresentations to the Commission or engaged in other misconduct during the application process. The authority to impose forfeitures on applicants is conferred by the Communications Act. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 3002, 103 Stat. 2106, codified at 47 U.S.C. § 503(b)(2)(A). This proposal was not addressed in the comments, and we have therefore determined that our ALJs will have the authority to impose forfeitures up to the statutory maximum amount as proposed. *See* 47 U.S.C. § 503(b)(2)(A) ($25,000 for each violation to a maximum of $250,000 for continuing violations). In any case in which the ALJ, the Review Board or the Commission enlarge the issues to inquire into allegations of such misconduct, the enlarged issues shall include notice that, after hearings on the enlarged issue and upon a finding that the alleged misconduct occurred and warrants such penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount.[35]

52. A number of commenters submitted proposals to change the policies under which the Commission awards comparative credits and demerits in comparative broadcast proceedings. For example, RNJ would have us establish a comparative preference in FM proceedings for applicants that proposed to turn in an AM license. The NAACP suggests that interests held by Minority Enterprise Small Business Investment Companies not be attributable; that we expand broadcast experience credit to include comparable management experience; revise the minority sensitivity credit, making it available in any proceeding, not just to counter a minority ownership credit; and award comparative credit to applicants that have divested an FM or VHF TV station to minorities for no more than 75% of fair market value. These proposals were not raised in the *Notice*, and they are beyond the scope of this proceeding which focuses, for the most part, on the procedures employed in broadcast comparative cases rather than the comparative criteria used to evaluate the applicants.

VI. CONCLUSION

53. The process of selecting which of otherwise qualified applicants should be granted must remain fair and effective, but undue delay in that process disserves the public by delaying the institution of new service and exacting an economic toll on both the Government and the applicants. To the extent that we can eliminate unnecessary delays in that process, we will be serving the potential listening and viewing public, the American taxpayer and the applicants. Our review of the comments in this proceeding lead us to the conclusion that much can be done to expedite the resolution of these cases. Thus, we have adopted procedural changes that are designed to

reduce significantly the time consumed in resolving these comparative cases. Where cases had been resolved in an average of almost three years, we believe the procedures adopted herein will reduce the duration of routine cases prosecuted from HDO through ID, Review Board decision, and Commission decision to approximately 21 months. That is a reduction of one year in the time consumed in the resolution of these cases. The time saved will inure directly to the benefit of the public in terms of the faster provision of new service without any sacrifice in the Commission's ability to select the best from among the otherwise qualified applicants for new broadcast facilities.

54. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to impose new or modified requirements or burdens on the public. As such, the new rules are subject to approval by the Office of Management and Budget under the Paperwork Reduction Act and a copy of this Report and Order is being transmitted to the Office of Management and Budget along with a request for approval of these new paperwork requirements.

55. Final Regulatory Flexibility Analysis

I. Reason for the Action:

To expedite the resolution of comparative hearings involving applicants for new broadcast facilities.

II. Objective of this Action:

To expedite the resolution of comparative hearings involving applicants for new broadcast facilities.

III. Legal Basis:

These changes are taken under sections 4(i), 4(j), 5(b), 5(c), 303(r) and 309 of the Communications Act of 1934, as amended.

IV. Number and Type of Small Entities Affected by the Proposed Rule:

Applicants for available new broadcast facilities are, for the most part small entities. Presently, the Commission has pending approximately 3,000 such applications that may come under the rules proposed herein.

V. Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule: None.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule: None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:

Because these changes will expedite the resolution of comparative broadcast hearings for new applicants, it will generally permit the successful applicant to commence operation of the new station at an earlier date. Thus, the applicants, generally small entities, will be benefited by these changes. The Commission has considered, and in some cases adopted, commenters' suggestions to fulfill its goal of expediting the comparative hearing process with a minimum of cost or inconvenience to applicants.

58. Accordingly, IT IS ORDERED that the motions to accept late filed comments filed by the Howard University Small Business Development Center and the Congressional Black Caucus ARE GRANTED.

59. IT IS FURTHER ORDERED that Parts 0, 1, and 73 of the Commissions rules, 47 C.F.R. Parts 0, 1, and 73, ARE AMENDED as set forth in the Appendix hereto.

60. IT IS FURTHER ORDERED that the rule changes adopted herein shall be effective on February 13, 1991, except that the requirement for the submission of reports by permittees and licensees contained in 47 C.F.R. § 73.1620(g) will become effective 90 days from the publication of a summary of this *Report and Order* in the *Federal Register* or upon approval of that requirement by the Office of Management and Budget, whichever is sooner.

61. IT IS FURTHER ORDERED that the modification of the *Ruarch* policy enunciated herein shall become effective on March 21, 1991, and it shall apply to all requests for approval of agreements filed on that date and thereafter.

62. IT IS FURTHER ORDERED that all commercial broadcast applications that have been the subject of a public notice released prior to February 13, 1991, announcing the acceptance for filing of mutually exclusive applications, shall pay their hearing fee by March 15, 1991, unless an order designating such applications for hearing is released before that date. All applicants designated for hearing by orders released before March 15, 1991, should pay their hearing fee with their Notices of Appearance.

63. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

64. This action is taken pursuant to authority contained in sections 4(i), 4(j), 5(b), 5(c), 303(r) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(b), 155(c), 303(r) and 309.

For further information concerning this proceeding, contact Martin Blumenthal, Office of General Counsel (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

The parties filing comments in this proceeding were:

Administrative Conference of the United States
American Women in Radio and Television
Black Citizens for Fair Media, *et al* *
Caldwell Communications Corporation
Virginia Carson, Esq.
Cohen & Berfield
Congressional Black Caucus **
Federal Communications Bar Association *
Glen Gerberg
Giles Television Inc.

Henderson Broadcasting of Memphis, Inc.
Michael J. Hirrel, Esq. *
Hope Valley FM Limited Partnership **
Howard University Small Business Development Center **
J. M. Broadcasting, Ltd.
James River Communications Corporation
Koteen & Naftalin
Mid-West Family Group **
National Association for the Advancement of Colored People, *et al*
National Association of Black Owned Broadcasters, Inc. **
Pepper and Corazzini
Radio New Jersey
Sandpiper Broadcasting, Inc.
Stonewall Broadcasting, Inc.
Vince Lee Broadcasting, Ltd.
Walker, Bordelon, Hamlin, Theriot and Hardy
Dr. William D. Ward

* Indicates that the party filed Initial and Reply Comments.

** Indicates that the party filed Reply Comments only.

APPENDIX

47 C.F.R. Parts 0, 1, and 73 are amended as follows:

1. The authority citation for Part O continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. § 155, unless otherwise noted.

2. Section 0.251 is amended by adding a new paragraph (f)(12) as follows:

* * * * *

(12) In preparing decisions for Commission consideration on applications for review of routine broadcast comparative cases involving applicants for only new facilities, the General Counsel will make every effort to submit such draft decisions for Commission consideration within four months of the filing of the last responsive pleading. If the Commission is unable to adopt a decision in such cases within five months of the last responsive pleading, it shall issue an order indicating that additional time will be required to resolve the case.

* * * * *

3. Section 0.341 is amended by adding a new paragraphs (d) and (e) to read as follows:

* * * * *

(d) In the conduct of routine broadcast comparative hearings involving applicants for only new facilities, *i.e.*, cases that do not involve numerous applicants and/or motions to enlarge issues, the presiding administrative law judge shall make every effort to conclude the case within nine months of the release of the hearing designation order. In so doing, the presiding judge will make every effort to release an initial decision in such cases within 90 days of the filing of the last responsive pleading.

(e) Upon assignment by the Chief Administrative Law Judge, Administrative Law Judges, including the Chief Judge, will act as settlement judges in appropriate cases. *See* 47 C.F.R. § 1.244.

4. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

5. Section 1.221 is amended by deleting paragraphs (f) and (g) and the Note and by adding a new paragraph (c)(1) to read as follows:

* * * * *

(c) * * *

(1) In comparative broadcast proceedings involving applicants for only new facilities, the notice of appearance filed by all applicants in the proceeding shall indicate that service of the notice of appearance on the other parties in the case was accompanied by the materials required to be exchanged pursuant to the Standard Document Production Order (see section 1.325(c)(1) of this part) and the Standardized Integration Statement (see section 1.325(c)(2) of this part). The Standardized Integration Statement should be filed with the presiding Administrative Law Judge, but, unless the presiding Administrative Law Judge rules otherwise, the documents exchanged pursuant to the Standard Document Production Order should not be submitted to the presiding Administrative Law Judge. Failure to serve the required materials on all other parties to the case will be tantamount to a failure to file a notice of appearance.

6. Section 1.229 is amended by revising paragraphs (a) and (b) and adding new paragraphs (e) and (f) to read as follows:

* * * * *

(a) A motion to enlarge, change or delete the issues may be filed by any party to a hearing. Except as provided for in paragraph (b), such motions must be filed within 15 days after the full text or a summary of the order designating the case for hearing has been published in the *Federal Register*.

(b)(1) In comparative broadcast proceedings involving applicants for only new facilities, such motions shall be filed within 30 days of the release of the designation order, except that persons not named as parties to the proceeding in the designation order may file such motions with their petitions to intervene up to 30 days after publication of the full text or a summary of the designation order in the *Federal Register*. (*See* section 1.223 of this part).

(2) In comparative broadcast proceedings involving renewal applicants, such motions shall be filed within 30 days after publication of the full text or a summary of the designation order in the *Federal Register*.

(3) Any person desiring to file a motion to modify the issues after the expiration of periods specified in paragraphs (a), (b)(1), and (b)(2), above, shall set forth the reason why it was not possible to file the motion within the prescribed period. Except as provided in paragraph (c) of this section, the motion will be granted only if good cause is shown for the delay in filing. Motions for modifications of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.

* * * * *

(e) In comparative broadcast proceedings involving applicants for only new facilities, in addition to the showing with respect to the requested issue modification described in paragraph (d), the party requesting the enlargement of issues against an applicant in the proceeding shall identify those documents the moving party wishes to have produced and any other discovery procedures the moving party wishes to employ in the event the requested issue is added to the proceeding. In the event the motion to enlarge issues is granted, the Commission or delegated authority acting on the motion will also rule on the additional discovery requests, and, if granted, such additional discovery will be scheduled to be completed within 30 days of the action on the motion unless the persons subject to such additional discovery are not parties to the proceeding. In such case, additional time will be required to afford such persons adequate notice of the discovery procedures being employed.

(f) In any case in which the presiding judge, the Review Board or the Commission grants a motion to enlarge the issues to inquire into allegations that an applicant made misrepresentations to the Commission or engaged in other misconduct during the application process, the enlarged issues shall include notice that, after hearings on the enlarged issue and upon a finding that the alleged misconduct occurred and warrants such penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount. *See* 47 U.S.C. § 503(b)(2)(A).

7. A new section 1.244 is added as follows:

§ 1.244 Designation of a settlement judge

(a) In broadcast comparative cases involving applicants for only new facilities, the applicants may request the appointment of a settlement judge to facilitate the resolution of the case by settlement.

(b) Where all applicants in the case agree that such procedures may be beneficial, such requests may be filed with the presiding judge no later than 15 days prior to the date scheduled by the presiding judge for the commencement of hearings. The presiding judge shall suspend the procedural dates in the case and forward the request to the Chief Administrative Law Judge for action.

(c) If, in the discretion of the Chief Administrative Law Judge, it appears that the appointment of a settlement judge will facilitate the settlement of the case, the Chief Judge will appoint a "neutral" as defined in 5 U.S.C. §§ 581 and 583(a) to act as the settlement judge.

(1) The parties may request the appointment of a settlement judge of their own choosing so long as that person is a "neutral" as defined in 5 U.S.C. § 581.

(2) The appointment of a settlement judge in a particular case is subject to the approval of all the applicants in the proceeding. *See* 5 U.S.C. § 583(b).

(3) The Commission's Administrative Law Judges are eligible to act as a settlement judges, except that an Administrative Law Judge will not be appointed as a settlement judge in any case in which the Administrative Law Judge also acts as the presiding officer.

(4) Other members of the Commission's staff who qualify as neutrals may be appointed as settlement judges, except that staff members whose duties include drafting, review, and/or recommendations in adjudicatory matters pending before the Review Board or the Commission shall not be appointed as settlement judges.

(d) The settlement judge will have the authority to require applicants to submit their Standardized Integration Statements and/or their written direct cases for review. The settlement judge may also meet with the applicants and/or their counsel, indivudually and/or at joint conferences, to discuss their cases and the cases of their competitors. All such meetings will be off-the-record, and the settlement judge may express an opinion as to the relative comparative standing of the applicants and recommend possible means to resolve the proceeding by settlement. The proceedings before the settlement judge shall be subject to the confidentiality provisions of 5 U.S.C. § 584. Moreover, no statements, offers of settlement, representations or concessions of the parties or opinions expressed by the settlement judge will admissible as evidence in any Commission licensing proceeding.

8. Section 1.248 is amended by adding a new paragraph (d)(4) as follows:

* * * * *

(d) * * * *

(4) In broadcast comparative cases involving applicants for only new facilities, oral testimony and cross examination will be permitted only where, in the discretion of the presiding judge, material issues of decisional fact cannot be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings.

* * * * *

9. Section 1.277 is amended by revising paragraph (c) to read as follows:

* * * * *

(c) Except by special permission, the consolidated brief and exceptions will not be accepted if the exceptions and agrument exceed 25 double-spaced typewritten pages in length. (The table of contents and table of citations are not counted in the 25 page limit; however, all other

contents of and attachments to the brief are counted.) Within 10 days, or such other time as the Commission or delegated authority may specify, after the time for filing exceptions has expired, any other party may file a reply brief, which shall not exceed 25 double spaced typewritten pages and shall contain a table of contents and a table of citations. If exceptions have been filed, any party may request oral argument not later than five days after the time for filing replies to the exceptions has expired. The Commission or delegated authority, in its discretion, will grant oral argument by order only in cases where such oral presentations will assist in the resolution of the issues presented. Within five days after release of an order designating an initial decision for oral argument, as provided on paragraph (d) of this section, any party who wishes to participate in oral argument shall file a written notice of intention to appear and participate in oral argument. Failure to file a written notice shall constitute a waiver of the opportunity to participate.

* * * * *

10. Section 1.311 is amended by revising paragraph (c) as follows:

* * * * *

(c) Schedule for use of the procedures.

(1) In comparative broadcast proceedings involving applicants for only new facilities, discovery commences with the release of the hearing designation order, and, in routine cases, the discovery phase of the proceeding will be conducted in a manner intended to conclude that portion of the case within 90 days of the release of the designation order.

(2) In all other proceedings, except as provided by special order of the presiding officer, discovery may be initiated before or after the prehearing conference provided for in section 1.248.

(3) In all proceedings, the presiding officer may at any time order the parties or their attorneys to appear at a conference to consider the propoer use of these procedures, the time to be allowed for such use, and/or to hear agrument and render a ruling on disputes that arise under these rules.

* * * * *

11. Section 1.313 is amended by revising the introductory paragraph as follows:

* * * * *

The use of the procedures set forth in §§ 1.311 through 1.325 is subject to control by the presiding officer, who may issue any order consistent with the provisions of those sections which is appropriate and just for the purpose of protecting parties and deponents or of providing for the proper conduct of the proceeding. Whenever doing so would be conducive to the efficient and expeditious conduct of the proceeding, the presiding officer may convene a conference to hear argument and issue a ruling on any disputes that may arise under these rules. The ruling, whether written or delivered on the record at a conference, may specify any measures, including the following to assure proper conduct of the proceeding or to protect any party or deponent from annoyance, expense, embarassment or oppression:

* * * * *

12. Section 1.315 is amended by adding a new paragraph (e) as follows:

* * * * *

(e) *Broadcast comparative proceedings involving applicants for only new facilities.* In these cases, the 21-day advance notice provision of paragraph (a) shall be inapplicable to depositions of active and passive owners of applicants in the proceeding. All applicants in such proceedings should be prepared to make their active and passive owners available for depositions during the period commencing with the deadline for filing notices of appearance and ending 90 days after the release of the designation order, if such depositions are requested by a party to the proceeding. All such depositions will be conducted in Washington, D.C. or in the community of license of the proposed station, at the deponent's option, unless all parties agree to some other location.

13. Section 1.325 is amended by revising paragraph (a) and adding a new paragraph (c) as follows:

* * * * *

(a) A party to a Commission proceeding may request any other party except the Commission to produce and permit inspection and copying or photographing, by or on behalf of the requesting party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things which constitute or contain evidence within the scope of the examination permitted by § 1.311(b) and which are in his possession custody, or control or to permit entry upon designated land or other property in his possession or control for purposes of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by § 1.311(b).

(1) Such requests need not be filed with the presiding officer, but copies of the request shall be served on all other parties to the proceeding.

(2) The party against whom the request was made must, within 10 days, comply with the request or object to the request, claiming a priviledge or raising other proper objections. If the request is not complied with in whole or in part, the requesting party may file a motion to compel production of doucments or access to property with the presiding officer. A motion to compel must he accompanied by a copy of the original request and the responding party's objection or claim of priviledge. Motions to compel must be filed within five business days of the objection or claim of priviledge.

(3) In resolving any disputes involving the production of documents or acccess to property, the presiding officer may direct that the materials objected to be presented to him for *in camera* inspection.

* * * * *

(c) In comparative broadcast proceedings involving applicants for only new facilities, on the date established for filing notices of appearance (see § 1.221 of this part), all applicants will serve the materials listed in the Standard Document Production Order and the Standardized Integration Statement on all other parties in the case.

(1) *Standard Document Production Order*. The following documents must be produced or objected to on grounds of priviledge on the notice of appearance deadline (Unless otherwise directed by the presiding officer, copies of these documents should not be filed with the presiding officer): (A) all formation and organizational documents, including articles of incorporation, by laws, partnership agreements, voting rights, proxies, and any amendments to the foregoing documents; (B) all minutes of meetings relating to the application; (C) all documents relating to the rights or plans of persons or entities to purchase an interest in the applicant or of current owners to alienate their interests; (D) all documents relating to pledges, mortgages, security interests, or other encumbrances of any kind with respect to the applicant; (E) all bank letters and other financing documents with the dollar amounts unexpurgated; (F) all documents relating to the applicant's proposed transmitter site; (G) all documents relating to communications by proposed integrated principals with respect to their proposed participation in the management of the station and the disposition of their current employment; (H) all documents relating to prior integration pledges made by principals who propose to be integrated into the management of the station at issue; (I) all documents relating to communications by and between principals of the applicant concerning the application, including communications between active and passive principals; (J) representative documents relating to enhancement credits and preferences sought by the applicant's principals for local residence, civic participation, past broadcast experience, minority/female status, and the like; (K) all documents relating to commitments to divest other media interests; and (L) all documents that identify or describe the principals who are responsible for completing the application, arranging financing, obtaining the applicant's transmitter site, publishing the required notices, establishing the local public inspection file, and retaining lawyers, engineers, and other professionals.

(2) *Standardized Integration Statement*. The following information must be provided by all applicants on the notice of appearance deadline (Copies of this statement should be filed with the presiding officer and served on all parties to the proceeding):

(A) the ownership structure of the applicant, *i.e.*, whether it is a partnership, limited partnership, or a corporation (if a corporation, indicate whether it has voting and nonvoting stock);

(B) the ownership percentage of each owner;

(C) the identity of the owners who will work at the proposed station, what titles and duties they will have, how many hours they will work per week, and how they will reconcile any current business interests or employment with that commitment to the station;

(D) all other media interests held by the persons identified under (B), above;

(E) whether the integrated owners will claim credit for minority or female ownership and if so, specifically on what basis;

(F) whether the integrated owners will claim credit for local residence and civic involvement in the city of license or service area and if so, specifically on what basis (including a detailed chronology of past residence and a description of civic activities and their duration);

(G) whether the integrated owners will claim credit for previous broadcast experience and if so, provide a detailed list of the stations they worked at, the titles and duties they had, and the years in which they were so employed; and

(H) whether the applicant will claim a daytimer preference and if so, specifically on what basis.

(3) *Supplemental document production*. Parties may request additional relevant documents, not called for in the Standard Document Production Order, at any time after the release of the designation order. Initial supplemental requests for documents must be filed no later than ten days after the notice of appearance deadline. Supplemental document requests will be handled under the procedures established in paragraph (a) of this section. To facilitate the resolution of disputes concerning the production of documents, the presiding officer may convene a pre-hearing conference to hear argument on and dispose of any such disputes.

14. Section 1.1111 is amended by revising paragraph (c) as follows:

* * * * *

(c) Broadcast applicants that pay the hearing fee before the release of an order designating them for hearing are entitled to a refund of that fee, upon request therefor, whenever

(1) the application is granted without being designated for hearing;

(2) the application is dismissed, voluntarily or involuntarily, prior to designation for hearing, in the order designating the case for hearing, or for failure to file a Notice of Appearance (see § 1.221);

(3) the applicant is the only applicant designated in the proceeding that files a Notice of Appearance and that single remaining applicant is immediately grantable or grantable upon deletion of any matters specified in the designation order and requiring resolution (see § 1.229); or

(4) a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provides for the dismissal of all but one of the applicants, and the single remaining applicant is immediately grantable. However, if the single remaining applicant is not immediately grantable, it is not entitled to a refund of the hearing fee unless all outstanding matters can be deleted (see § 1.229).

(5) however, under paragraphs (3) or (4), hearing fees will be retained by the Commission in any case requiring a decision on the merits of an applicant's post-designation amendment or evidentiary showing, whether by Summary Decision or otherwise. *See* §§ 1.251 and 1.267.

15. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

16. Section 73.1620 is amended by adding a new paragraph (g) as follows:

* * * * *

(g) *Reports required.* In their application for a license to cover a construction permit (FCC Form 302) and on the first anniversary of the commencement of program tests, applicants for new broadcast facilities granted as a result of a settlement or other decision in a comparative proceeding must report

(1) any deviations from comparative proposals relating to integration of ownership and management and diversification of the media of mass communciation contained in their application for a construction permit at the time such application was granted; and

(2) any deviations from an active/passive ownership structure proposed in their application for a construction permit at the time such application was granted.

(3) The reports referred to in paragraphs (1) and (2) shall not be required in any case in which the order granting the application relieved the applicant of the obligation to adhere to such proposals.

17. Section 73.3571 is amended by adding new paragraphs (c)(1) and (c)(2) as follows:

* * * * *

(c) * * * *

(1) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (c) will also announce the date on which all mutually exclusive applicants (including the previously accepted lead applicant) will be required to pay the hearing fee established in Part 1 of these rules, 47 C.F.R. § 1.1104(2)(c). The date for fee payment shall be at least 30 days after the date established for petitions to deny.

(2) Whenever the public notice announces the acceptance of an application that is mutually exclusive with a renewal application, it shall also announce that the mutually exclusive applicants and the renewal applicant will be required to pay the hearing fee on the date established in the public notice.

* * * * *

18. Section 73.3572 is amended by adding new paragraphs (c)(1) and (c)(2) as follows:

* * * * *

(c) * * * *

(1) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (c) will also announce the date on which all mutually exclusive applicants (including the previously accepted lead applicant) will be required to pay the hearing fee established in Part 1 of these rules, 47 C.F.R. § 1.1104(1)(c). The date for fee payment shall be at least 30 days after the date established for petitions to deny.

(2) Whenever the public notice announces the acceptance of an application that is mutually exclusive with a renewal application, it shall also announce that the mutually exclusive applicants and the renewal applicant will be required to pay the hearing fee on the date established in the public notice.

* * * * *

19. Section 73.3573 is amended by adding new paragraphs (f)(2)(A) and (f)(2)(B) as follows:

* * * * *

(f) * * * *

(2) * * * *

(A) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (f)(2) will also announce the date on which all mutually exclusive applicants will be required to pay the hearing fee established in Part 1 of these rules, 47 C.F.R. § 1.1104(2)(c). The date for fee payment shall be at least 30 days after the date established for petitions to deny.

(2) Whenever the public notice announces the acceptance of an application that is mutually exclusive with a renewal application, it shall also announce that the mutually exclusive applicants and the renewal applicant will be required to pay the hearing fee on the date established in the public notice.

* * * * *

FOOTNOTES

[1] A complete list of parties filing comments and reply comments is contained in an Appendix hereto. We are also accepting and considering late filed reply comments submitted by the Howard University Small Business Development Center and the Congressional Black Caucus.

[2] *See, e.g.*, comments of Koteen and Naftalin (K&N) and the NAACP.

[3] Hirrel opines that making settlements less attractive will actually facilitate hearings by discouraging the filing of speculative applications. Discouraging applicant speculation in the comparative process by reducing the expectation of monetary rewards at settlement is the subject of our companion *Report and Order* in *Amendment of Section 73. 3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, FCC 90-411 (adopted December 13, 1990).

[4] RNJ suggests $12,000.

[5] The FCBA also opposes any increase in the hearing fee.

[6] *See* 47 C.F.R. §§ 73.3571(c) (for AM), 73.3572(c) (for TV), 73.3573(f)(2) (for non-reserved band FM filed during a "window").

[7] The public notice announcing the "B" cut-off date identifies all the mutually exclusive applications, and the "B" cut-off date is at least 30 days after the release of the public notice.

[8] The legislative history of the Consolidated Omnibus Budget Reconciliation Act of 1985 describes the hearing fee as "[t]he charge levied when an application is designated for hearing." Conference Report to Accompany H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 427 (1985). However, we do not believe that Congress' description of the fee was intended to limit our discretion to collect the fee at a particular time. Similarly, the legislative history of the Omnibus Budget Reconciliation Act of 1989 states that "[a]pplicants designated for hearing in mutually exclusive, comparative new construction permit, comparative renewal or major/minor change adjudicative proceedings are required to pay fees prior to the applicant's participation in the hearing." 135 *Congressional Record* H 9612 (Nov. 21, 1989). The earlier collection of the hearing fee would not be inconsistent with the 1989 language, but, as with the 1985 legislative history, there is no indication that Congress intended to limit the Commission's discretion to devise regulations for the efficient collection of the fees, including regulations that would alter the time that such payments were required.

[9] We recognize, as observed by RNJ, that preserving the hearing fee refund in settlement cases under section 1.1111(c)(1) may dilute some of the effect achieved by the earlier payment of the hearing fee. On the other hand, as noted by the Hardy Group and AWRT, the HDO plays a role in precipitating settlements, and our own experience indicates that many settlements are filed early in the process to take advantage of the fee exemption in section 1.1111(c)(1). Thus, on balance, we are retaining the fee exemptions in section 1.1111(c) and providing for a refund of the earlier paid fees in the circumstances set out in that rule.

[10] After publication of this rule change in the *Federal Register*, the Commission will issue a public notice specifying the method for payment of the hearing fee.

[11] The Form 301 was amended to require the additional information for applications filed on or after June 26, 1989. Applications that were pending prior to that date were not required to provide the newly required information. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, *recon. denied*, 5 FCC Rcd (1990).

[12] Presently, such comparative upgrades are not permitted. *See Daytona Broadcasting Co., Inc.*, 101 FCC 2d 1010, 1012, *recon. granted in part*, 102 FCC 2d 931 (1986).

[13] The settlement judge process is an alternate means of dispute resolution within the meaning of the Administrative Dispute Resolution Act. P.L. 101-552 (November 15, 1990). *See* 5 U.S.C. § 581(3). The *Notice* also solicited comments on the potential uses of other alternative dispute resolution techniques in the comparative process. William Ward and Virginia Carson support the use of mediators in the pre-designation settlement process. Section 3 of the Administrative Dispute Resolution Act requires agencies to adopt a policy that addresses alternate means of dispute resolution, and we will take up the question of what other forms of alternative dispute resolution may be efficacious in a separate proceeding commenced under that Act.

[14] The settlement judge shall be a "neutral" as defined in the Administrative Disputes Resolution Act, 5 U.S.C §§ 581(9) and 583(a -d), and he shall have all the powers conferred by that Act. On December 31, 1992, the Chief ALJ shall submit a report to the Commission reflecting the number of cases in which settlement judges have been assigned and the resolution of those cases.

[15] *See also WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989) *application for review pending* ; *Mark W. Wodlinger*, FCC 89I-04 (Gen. Counsel Jan. 10, 1989); *Breaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 5409 (Rev. Bd. 1989).

[16] Under this policy, an applicant could only be relieved of divestiture proposals relating to its comparative standing. Divestiture required by operation of the Commission's ownership restrictions would remain in force.

[17] Compare Section 73.3597 of our rules, which generally provides for a one year holding period for stations authorized after a comparative hearing. 47 C.F.R. § 73.3597(a). The one year period commences with the date on which the stations initiated program tests. 47 C.F.R. § 73.3597(b).

[18] We believe that FCBA's proposal to select a runner-up, who would displace the winning applicant if it failed to live up to its promises, raises legal and other issues that go far beyond the scope of matters set forth in the *Notice*. Accordingly, that proposal will not be considered in this proceeding.

[19] As with the notice of appearance, the documents will be served on counsel for all competing applicants. If no counsel is indicated in an applicant's previous filings, the material will be served on the applicant at the address indicated in the application.

[20] This decision should not be taken as an indication of Commission action in adjudicatory cases that involve questions relating to the active/passive ownership structure under the *Anax* doctrine. As such cases come before us, we will decide them on the basis of the record compiled by the parties.

[21] Similarly, the ALJs retain the discretion to permit the submission of rebuttal cases in the form most conducive to the efficient resolution of the case.

[22] In a companion to this decision, in the *Report and Order* in *Amendment of Section 73. 3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, we determined that applicants entering into settlements after the commencement of the hearing would be ineligible for reimbursement of any expences incurred in the prosecution of their applications.

[23] We are aware of commenters' observations that hearings are often delayed by the unavailability of hearing rooms. In order to meet this guideline, the Office of Managing Director will ascertain how many, if any, additional hearing rooms are necessary and whether that need can be accomodated by putting existing conference rooms and the Commission meeting room into service as hearing rooms. If these alternatives should prove insufficient and additional space is required, we will undertake to make additional hearing rooms available within the limitations of the Commission's budget.

[24] That is, 45 days for findings and 15 days for replies. However, if delays in obtaining hearing transcripts is not a factor, findings should be filed within 30 days. Generally, this time allotment and the time guidelines for the hearing phase of the routine comparative case reflect the fact that motions for extension of the time within which to file pleadings are "not routinely granted." 47 C.F.R. § 1.46(a). In ruling on any extension requests that may be filed under the section 1.46(a) standard, ALJs should closely examine the pleadings to determine whether the request is based on a clear showing of good cause.

[25] Because we expect changes in the nature and number of comparative proceedings as a result of changes accomplished in this *Report and Order* and the *Report and Order* on settlement reimbursement, the 90-day time guideline for IDs is, at this stage, only an estimate of the appropriate time for the preparation of these decisions. So that we can refine this estimate, two years after the effective date of these changes, the Chief Administrative Law Judge will report to the Commission on the ability of our ALJs to meet the time guidelines in routine cases. In cases in which motions to enlarge issues are filed, additional time will be necessary to accommodate the handling of the motion and any additional discovery or hearings that may be required as a result of enlarged issues. We previously determined that expedited discovery procedures would apply to enlarged issues, and, to further reduce the time consumed by issue enlargement, we will adopt FCBA's proposal to require the filing of motions to enlarge within 30 days of the release of the HDO.

[26] Time limits on the ALJs are permissible so long as they do not unduly interfere with a judge's independence to control the course of the proceeding, *Butz v. Economou*, 438 U.S. 478, 513 (1978), or subject the judge to performance appraisals. *See* 5 C.F.R. § 930.211. We do not believe that the proposed time guideline for decisions unduly circumscribes an ALJ's independence, and the proposed guidelines and tracking system would not be used for performance appraisals.

[27] In this regard, we believe that MAP's proposal to delegate additional reviewing authority to the Board would be inconsistent with the limitations on such delegations in section 5(c) of the Communications Act. 47 U.S.C. § 155(c)(1)-(6).

[28] The FCBA's suggestion that we eliminate petitions for reconsideration of Review Board decisions appears inconsistent with section 5(c)(5) of the Act, 47 U.S.C. § 155(c)(5), which provides that parties filing applications for review of Board decisions may not rely on questions of fact or law upon which the Board has been afforded no opportunity to pass. The petition for reconsideration permits parties to raise such "new matter" with the Board before seeking Commission review. Thus, we reject this proposal.

[29] The provision was enacted in 1952, prior to the authorization of the Review Board. Thus, the policy enunciated in this section did not contemplate the two-stage review process that now exists.

[30] We note that the FCBA's suggestion to eliminate petitions for reconsideration of Board decisions, rejected at note 28, above, also appears to be inconsistent with the FCBA's proposal that the Commission limit its review to important policy matters. The proposed limitation on the Commission's review function could result in judicial review of Board decisions that were not subject to Commission review and in which the Board had been afforded no opportunity on reconsideration to correct or address possible legal errors. To the extent any legal errors are not corrected by the Board itself, the Commission's review, in addition to considering important policy questions, must focus on whether the Board's decision is adequate to withstand judicial review.

[31] Exceptions to IDs are filed within 30 days of the release of the decision, and oppositions (or replies) are filed 15 days there after.

[32] Even if such a rule were permissible under the statutory scheme, an order, "disposing of all applications for review," would be required for the computation of time for judicial review. *See* 47 U.S.C. § 155(c)(7).

[33] Applications for Review must be filed within 30 days of the release of the Board's decision, and oppositions must be filed within 15 days of the Application for Review. Thus, considering this pleading cycle, in the routine case, the Commission will act within approximately six and a half months of the release of the Board decision.

[34] As with the time guidelines for the hearing phase of the case, the time allotment for Review Board and Commission review of these cases reflects the fact that motions for extension of the time within which to file pleadings are "not routinely granted." 47 C.F.R. § 1.46(a). In ruling on any extension requests that may be filed under the section 1.46(a) standard, the Review Board and the Commission will closely examine the pleadings to determine whether the request is based on a clear showing of good cause.

[35] Where such issues are specified in the HDO, that order will contain a similar notice.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

In the Matter of Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Gen. Doc. No. 90-264.

I fully support the Commission's decision to reform the comparative hearing process for awarding broadcast licenses. Encouraging settlements at an earlier stage in the process and structuring the proceedings in a systematic way should reduce significantly the time and resources devoted to this aspect of our statutory mission. If the rules we adopt today have their intended effect, and I have every reason to believe they will, everybody will benefit.

I am writing separately only to direct the Commission's attention to certain issues raised by commenters that were outside the scope of the instant proceeding. Specifically, several commenters advocated changing the policies for assigning comparative merits and demerits.[1] We declined to address their proposals because they were not raised in the Notice. *Report and Order* at ¶ 52. I have no quarrel with this outcome, but we should not shelve the idea of reevaluating our comparative criteria.

I think the Commission should initiate a new rulemaking proceeding to reexamine some of our policies for evaluating competing applications. Some of the proposals submitted in this proceeding might provide a good point of departure for such an analysis. In addition, I have long argued that the Commission should adopt a "finder's preference" for the applicant that searches for and finds a vacant allotment or successfully obtains a change in the table of allotments. It seems to me that our policies should reward those applicants who go to the trouble and expense of locating available frequencies.

For this reason, I sincerely hope that a reevaluation of our comparative criteria can be made a part of the anticipated "attic to basement" review of broadcast regulations in the coming year.

FOOTNOTE FOR STATEMENT

1 *See, e.g.,* Comments of NAACP; Comments of Radio New Jersey.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-623

In the Matter of

Computer III Remand Proceedings:
Bell Operating Company Safeguards;
and Tier 1 Local Exchange Company
Safeguards

NOTICE OF PROPOSED RULE MAKING AND ORDER

Adopted: December 13, 1990; Released: December 17, 1990

By the Commission: Commissioner Duggan concurring and issuing a statement.

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I. INTRODUCTION

1. In the *Computer III* proceeding, the Commission adopted major changes to the rules governing the Bell Operating Companies' (BOCs') participation in the enhanced services market.[1] In particular, the Commission replaced the requirement that the BOCs offer enhanced services through separate subsidiaries with a set of nonstructural safeguards designed to protect against both discrimination against competing enhanced service providers (ESPs) and cross-subsidization of BOC enhanced services by basic service offerings. In *California v. FCC*, the United States Court of Appeals for the Ninth Circuit vacated and remanded the first three of the Commission's *Computer III* orders.[2] The Court concluded that the Commission had not sufficiently justified the decision to replace structural separation with nonstructural safeguards for BOC provision of enhanced services. The Ninth Circuit also held that the Commission's preemption of certain kinds of state regulation lacked adequate justification.

2. Since the *California* decision, this Commission has undertaken a re-examination of our regulatory regime in this area to consider what safeguards would best encourage the broad-based delivery of enhanced services to the American consumer through the growth of full and fair competition. A technologically innovative and economically efficient telecommunications infrastructure is central to continued United States prominence in the increasingly information-oriented global economy in which we live. To this end, we must remove unnecessary regulatory barriers that impede the responsiveness of American companies to marketplace incentives that foster increasing use and advancement of the nation's telecommunications assets. At the same time, it is equally critical to the development of full and fair competition to establish and maintain effective regulatory safeguards against possible anticompetitive conduct. Our duty to protect regulated service ratepayers requires us to guard against cross-subsidy between basic and enhanced services. Our goal is to put into place effective regulatory safeguards that will best further these public interest goals and serve American consumers.

3. We here propose to institute a strengthened set of nonstructural safeguards to govern BOC provision of enhanced services, including strengthened cost allocation and accounting safeguards applicable to all Tier 1 LECs. We also propose to re-examine the Customer Proprietary Network Information (CPNI) requirements applied to the integrated provision of interstate basic and enhanced services by the BOCs. [3] We propose as well to preempt only those state regulations differing from our federal safeguards that would thwart or impede federal policy, such as our policy permitting the integrated provision of interstate basic and enhanced services by the BOCs, AT&T, and the independent telephone companies (ITCs). Finally, we extend until the completion of this Rule Making

proceeding the interim waiver of *Computer II* requirements granted the BOCs by the Common Carrier Bureau, and clarify the scope of that waiver.[4]

II. REGULATORY SAFEGUARDS GOVERNING BOC PROVISION OF ENHANCED SERVICES

A. Background

1. *Computer II*

4. In the *Computer II* proceeding,[5] the Commission decided that enhanced services are not subject to Title II of the Communications Act.[6] Nonetheless, the Commission was concerned about the potential for anticompetitive conduct and cross-subsidization that could result from AT&T's participation in the enhanced services market. In particular, the Commission was concerned that AT&T could discriminate against competing ESPs through its control over basic services, and shift costs from unregulated to regulated activities.[7] Accordingly, the Commission required AT&T to offer any enhanced services through a fully separated, arm's length subsidiary.

5. Under *Computer II*, AT&T's separate subsidiary was prohibited from providing basic services or owning any network or local distribution transmission facilities, and AT&T was prohibited from offering enhanced services on an integrated basis.[8] The Commission required that AT&T's separate subsidiary obtain under tariff all transmission facilities necessary for the provision of enhanced services.[9] In addition, the Commission required the subsidiary to elect separate officers; maintain separate books of account; employ separate operating, installation, and maintenance personnel; and perform its own marketing and advertising.[10] Moreover, the Commission prohibited the regulated companies and their affiliates from performing software development for each other. Thus, the enhanced service subsidiary had to undertake software design itself or obtain the software from an independent contractor.[11] The regulated companies, however, could provide the affiliate with other types of research and development so long as any transactions were performed on a fully compensatory basis.[12]

6. In addition, the Commission required that AT&T disclose certain kinds of network information. The Commission required that AT&T disclose network information regarding certain new services and network modifications to the public whenever it disclosed such information to its enhanced service subsidiary or to third parties for the benefit of the subsidiary.[13] Furthermore, the Commission established rules regarding customer proprietary information, which required AT&T to disclose this information to independent ESPs at the same time the subsidiary received the information, and under the same terms and conditions.[14] The *Computer II* decision was affirmed on review.[15]

2. Modification of Final Judgment and BOC Separation Order

7. In 1982, two years after the Commission had imposed structural safeguards on AT&T's provision of enhanced services, the United States District Court for the District of Columbia adopted the Modification of Final Judgment (MFJ) in *United States v. AT & T.*[16] Under the MFJ, AT&T was required to divest itself of its twenty-two wholly-owned operating companies, which were then reorganized into seven regional holding companies. As a result of divestiture, the BOCs owned and operated the local exchange facilities and provided intra-LATA toll service, while AT&T provided inter-LATA services.[17] The Court also prohibited the BOCs from manufacturing telecommunications equipment and providing information services.[18] The MFJ Court initially left the question of whether to apply structural separation requirements to BOC CPE and enhanced service operations to legislators and regulators.[19] The Commission addressed this question in the *BOC Separation Order* in late 1983, and required that the BOCs provide CPE, enhanced services, and cellular services through separate subsidiaries.[20] In deciding to apply structural separation requirements to the BOCs, the Commission recognized that various circumstances, including divestiture and state regulatory oversight, had reduced the opportunities for the BOCs to engage in cross-subsidization and discrimination.[21] Nevertheless, the Commission found that the BOCs retained the ability to shift costs from unregulated to regulated activities, otherwise misallocate joint and common costs, and discriminate against competitors through control of the local exchange. The Commission therefore concluded that the benefits of structural separation outweighed the costs of requiring the BOCs to form and operate separate subsidiaries.

8. The Commission undertook, however, to review the appropriateness of structural separation for BOC unregulated activities within two years.[22] In addition, the Commission permitted the BOCs to engage in some joint operations for the provision of CPE and basic services.[23] In the *BOC Separation Reconsideration Order* of June 1984, the Commission affirmed the imposition of structural separation, but noted that nonstructural safeguards might, in the future, prove adequate to protect the public interest.[24]

3. *Computer III*

9. In the *Computer III* proceeding,[25] the Commission re-examined the regulatory framework for BOC provision of enhanced services adopted in *Computer II* and the *BOC Separation Order*. In the *Phase* I Ord er of June 1986, the Commission found that the competitive nature of the enhanced services market, along with various technical and market developments since *Computer II* and the *BOC Separation Order*, had limited the BOCs' ability to engage in cross-subsidization.[26] Using a cost/benefit analysis, the Commission concluded that when compared to nonstructural safeguards, structural separation requirements for BOC enhanced services imposed significant costs on both the public and the BOCs. These costs included decreased efficiency, innovation, and service availability caused in part by the requirement for BOC duplication of facilities and personnel as well as by limitations on joint marketing. The Commission found that, relative to nonstructural safeguards, the costs of structural separation outweighed the benefits. The Commission therefore replaced structural separation with nonstructural safeguards designed to guard against cross-subsidization and discrimination.[27] These measures included, among other things, CEI requirements to ensure the BOCs' ESP competitors "equal access" to BOC basic network services, ONA provisions for expanded ESP access to unbundled network functionalities, and the rules to be developed in the *Joint Cost* proceeding for the allocation of joint costs between regulated and nonregulated activities.[28]

4. California v. FCC

10. In *California v. FCC,* the Court of Appeals reviewed the cost/benefit analysis underlying the *Computer III* decision to replace structural separation with nonstructural safeguards for the provision of BOC enhanced services. The Court stated that the Commission had justified the use of nonstructural safeguards, such as ONA, to prevent the BOCs from providing ESP competitors with discriminatory access to basic network services.[29] But the Court found that the Commission's decision to rely on cost accounting safeguards was arbitrary and capricious, stating that the record did not adequately support the use of cost accounting safeguards to guard against cross-subsidization of enhanced services by the BOCs.[30] The Court vacated the Commission's decision to substitute nonstructural safeguards for structural separation in its entirety and remanded the proceeding to the Commission.

11. In order to avoid disruption of service to consumers following the Ninth Circuit's decision vacating *Computer III,* the Common Carrier Bureau granted an interim waiver of the *Computer II* requirements to allow the BOCs to continue offering enhanced services on an integrated basis pursuant to approved CEI plans. The BOCs, however, were required to withdraw all pending CEI plans, directed to refrain from filing new CEI plans, and ordered to discontinue integrated planning and development of BOC enhanced services except for those that are the subject of an approved CEI plan. The Bureau invited comment on whether the waiver should be extended for the duration of the remand proceeding.[31]

B. Discussion

1. Benefits of Integrated Enhanced Service Operations

12. The California Court, despite its remand, upheld the Commission's determination in *Computer III* that BOC structural separation requirements impose significant public interest costs. Specifically, the Court found record support for the Commission's conclusion that structural separation has resulted in increased prices for enhanced services, the withdrawal of certain enhanced services from the market, and the unavailability of some new forms of enhanced services.[32] The Court also found record support for the FCC's determination that structural separation imposes costs on consumers who have to pay for separate facilities.[33] The Court specifically noted that in the absence of structural separation, "the BOCs would not have to maintain, and customers would not have to pay for, separate organizations and facilities for operating and repairing basic and enhanced services."[34] Moreover, the Court said that the Commission had record support for its conclusion that integration of BOC enhanced and basic service operations would yield economies of scale. For example, as the *California* Court stated, the removal of structural separation requirements allows the BOCs to market and offer customized basic and enhanced service packages. These packages, according to the Court, minimize transaction costs and reduce delays in the delivery of such services.[35]

13. We propose to readopt the Commission's findings that a structural separation requirement imposes substantial public interests costs and that permitting the BOCs to integrate their enhanced and basic service operations would provide benefits to both the enhanced services industry and consumers. As the Commission found in *Computer III,* and the Court affirmed, the substitution of nonstructural safeguards for structural separation would increase the development and availability of enhanced services not only to large business customers but to residential and small business customers as well.[36] Our experience indicates that since adoption of *Computer III,* the BOCs have successfully begun to market enhanced services to these sectors. We request that parties comment on these tentative conclusions and provide evidence in support of their views. We are particularly interested in receiving comments that draw on parties' own experience to date with integrated operations and that rely as much as possible on existing or planned services.

2. Safeguards Against Cross-Subsidization

14. The *California* Court overturned the Commission's decision in *Computer III* to rely on nonstructural safeguards to protect against cross- subsidization because of an absence of record support for "the Commission's position that market and technological changes since *Computer II* and the *BOC Separation Order* have reduced the danger of cross-subsidization by the BOCs."[37] For instance, the Court found that the Commission had failed to explain the reasons in *Computer III* for its "new-found faith" in the efficacy of state regulation in preventing improper cross-subsidization, which it had just questioned in the *BOC Separation Order.*[38] Nor did the Commission, according to the Court, identify the change in circumstances that occurred during the 14 months between the conclusion of the *BOC Separation* proceeding and the initiation of the *Computer III* proceeding that justified the Commission's new emphasis on the importance of the AT&T divestiture in evaluating the risks of cross-subsidization.[39] In sum, the Court found that the Commission had failed to "cite any changes since the *BOC Separation Order* that logically reduces the danger of cross-subsidization by the BOCs."[40] Although concluding that the record failed to show reduced cost-shifting opportunities or incentives for the BOCs,[41] the Ninth Circuit noted that the FCC could have justified its decision on the grounds "that the national interest in allowing the BOCs to compete more efficiently in the enhanced services industry justified reduced regulatory protection against cross- subsidization," but stated "that this is not the case before us."[42]

15. Given these criticisms in the *California* Court's opinion, we have re-examined the public interest benefits of nonstructural safeguards in light of regulatory developments since adoption of the *BOC Separation Order* in late 1983. A possible cost of permitting integrated operations in reliance on nonstructural safeguards is an increased risk of cross-subsidization. Our goal is to protect ratepayers from possible cross-subsidization without placing unnecessary restrictions on the BOCs that hamper their ability efficiently to provide enhanced services to the American consumer. For the reasons described below, we tentatively conclude that our cost allocation safeguards with the revisions proposed in this *Notice* will effectively guard against cross-subsidization. Even assuming that there may be some diminution in protection with cost allocation safeguards relative to structural separation, we tentatively conclude that the danger of this is outweighed by the benefits of integated operations.[43]

16. One critical factor in this analysis is our experience with the adoption and implementation of detailed cost allocation rules and related cost accounting safeguards that separate nonregulated service costs from regulated service costs.[44] At the time of the *BOC Separation Order,*

and at the time of *Computer III*, no effective cost allocation safeguards existed. These rules are now in place and operating.

17. The Commission's joint cost and affiliate transaction rules represent a careful approach geared to protect ratepayers.[45] In particular, carriers are not permitted to recover costs designated as nonregulated in their provision of regulated products and services. Under the Commission's cost allocation rules, costs are directly assigned to regulated or nonregulated activities whenever possible. Costs that cannot be directly assigned are attributed, if possible, to regulated or nonregulated activities in accordance with cost causation principles. All remaining costs are allocated according to a general allocation factor based on the division of total company expense. In specifying cost allocation factors, the Commission acted to ensure that ratepayer interests were protected. For instance, the Commission declined to adopt an incremental costing approach, which would have encouraged faster development and deployment of enhanced services by fostering lower prices. Instead, the Commission used a fully distributed cost allocation methodology, assigning a portion of general overhead to nonregulated activities, which ensured that regulated service ratepayers benefit from efficiencies gained through joint use of the network. The Commission also adopted affiliate transaction rules that prevent the BOCs from charging ratepayers inflated prices for goods and services obtained from nonregulated affiliates, or from providing these affiliates with goods and services at unduly low prices.[46]

18. The Commission has also implemented various cost accounting mechanisms to enforce the joint cost rules. The *Joint Cost Order* required that AT&T and all Tier 1 LECs[47] file cost allocation manuals implementing the Commission's cost allocation rules. The BOCs filed the required cost allocation manuals in 1987. After public comment and careful review, the Common Carrier Bureau conditionally approved the BOC manuals, but required significant revisions in the manuals for each cost category to ensure that the allocations were as precise as possible. For example, the BOCs initially proposed allocating the costs in many of the executive and administrative categories on the basis of a general allocation factor, *i.e.*, the ratio of all directly assigned or attributable nonregulated expenses to total company expenses. The Commission rejected this method since many of the costs could be directly assigned or attributed.[48] Based on detailed instructions from the Bureau, the BOCs refiled their manuals in early 1988. The Commission has now approved all of the BOCs' revised cost allocation manuals subject to certain conditions.[49]

19. The *Joint Cost Order* also directed each of these carriers to obtain and file audits by independent accounting firms of the carriers' cost allocation results reported to the Commission.[50] In implementing this requirement, the independent auditors were required to provide a positive opinion on whether the carriers' methodologies for separating regulated and nonregulated costs were consistent with the carrier's cost allocation manual approved by the Commission and whether the carrier's financial reports reflected an accurate application of those methodologies.[51] The BOCs have now submitted the 1988 and 1989 independent audits of their joint cost allocations.

20. In a separate proceeding, the Commission has also instituted the Automated Reporting and Management Information System (ARMIS),[52] which establishes a computerized information reporting system that provides detailed cost and revenue information from the BOCs and other large carriers. This system, which was also established after the *Computer III* decision, permits easy benchmark comparisons among large local exchange carriers and across time periods to identify serious discrepancies warranting particular Commission attention. In the *ARMIS Order*, the Commission required carriers to file new computerized reports aimed at detecting improper cost-shifting. The quarterly report contains aggregated financial data reflecting the results of the accounting and cost allocation requirements prescribed in Part 32[53] and Part 64[54] of the Commission's Rules. Also, carriers were required to file an annual USOA Report displaying the results of their total activities for every account in the USOA, and a Joint Cost Report showing the allocation to regulated and nonregulated activities for all accounts involved in the ratemaking process.

21. Now in its third year of implementation, the benchmarking process embodied in the Commission's various cost accounting safeguards has allowed the Commission to identify significant disparities in the individual BOC's cost allocations. For example, in the tariff review process, the Commission relied on information developed in staff audits and used the benchmarking process, along with other regulatory techniques, to save consumers hundreds of millions of dollars by comparing the allocations made by the carriers. In particular, in the 1989 and 1990 annual access tariff review process, the Bureau disallowed approximately $214 million in local exchange carriers' interstate basic service rates. The Bureau concluded that the costs should have been allocated to the installation and maintenance of nonregulated inside wiring rather than regulated service offerings.[55]

22. In another action enforcing our safeguards, we issued a *Notice of Apparent Liability* against the NYNEX telephone companies for apparently improper affiliate transactions between NYNEX's local exchange telephone subsidiaries, New York Telephone (NYT) and New England Telephone and Telegraph Company (NET), and NYNEX's nonregulated affiliate, the Material Enterprises Company (MECO), which provided centralized procurement and support services for the NYNEX telephone companies.[56] Based on a Common Carrier Bureau audit, we tentatively concluded that MECO had overcharged its telephone company affiliates by a total of $118.5 million from 1984 through 1988. Accordingly, this Commission ordered NYT and NET to show cause why they should not be required to remove $32.6 million in excessive capital costs from their rate base, and perform ratemaking adjustments to return $35.5 million in improper charges imposed on interstate ratepayers.[57] This Commission also found NYT and NET apparently liable for forfeitures totaling in excess of $1.419 million for violation of the Commission's rules.[58] On October 3, 1990, this Commission entered into a consent decree in which NYNEX agreed to reduce its interstate capital account balances by $32.6 million, reduce interstate revenue requirements by $35.5 million, and make contributions to the United States Treasury in the amount of $1.419 million.[59] Having obtained for interstate ratepayers and the Treasury all of the relief sought by the *Order to Show Cause*, without delay or litigation risk, we agreed to terminate the proceeding without a finding of wrongdoing on the part of NYNEX.

23. This Commission also has vigorously pursued other apparent violations of our cost accounting rules, and has taken action where appropriate. For instance, as a result of a Commission audit of the National Exchange Carrier Association (NECA), we have notified Pacific Bell, Southwestern Bell Telephone Company, New England Telephone and Telegraph Company and New York Telephone Company that they are apparently liable for forfeitures totaling $ 1 million for violation of our accounting rules. This audit focused on the NECA settlement process and certain unusually large adjustments reported to the NECA pool by these carriers during the last three months of 1988.[60]

24. As the preceding paragraphs demonstrate, the Commission has made significant strides since it committed to develop cost allocation safeguards as part of a system of nonstructural safeguards in the initial *Computer III* decision. We have adopted cost allocation safeguards and affiliate transaction rules, reviewed and required substantial changes in the carriers' implementing cost allocation manuals, reviewed the first two sets of independent audits, and conducted our own field audits. In addition to this, we have undertaken a number of important enforcement actions that produced significant benefits for consumers.[61]

25. This Commission's recent adoption of incentive regulation for the LECs is yet a further step that reduces BOC incentives to cross-subsidize. That major development also has occurred long after the *BOC Separation Order* and was not a part of the record before the Court in *California*. Under price cap regulation, the BOCs are no longer automatically entitled to increase rates to recoup cost increases as they would have been under a cost-plus, rate of return system of regulation. Instead, rate levels are adjusted to reflect inflation and anticipated efficiency gains by the BOCs. Thus, unlike under rate-of-return regulation, any misallocation of nonregulated costs to regulated operations under price cap regulation normally would not permit higher prices and increased earnings.[62] Rather, any such additional costs would merely reduce BOC earnings.[63] Although reducing cross-subsidy incentives, LEC price cap regulation does not by itself eliminate improper cost allocation as a matter of regulatory concern, but serves as an effective complement to cost accounting, reporting, auditing, and enforcement safeguards.

26. After thorough re-examination, we now believe that significant regulatory developments since adoption of the *BOC Separation Order*, and indeed since the Commission's *Computer III* decision, have reduced the incentives for BOCs to engage in improper cross-subsidization of their enhanced service operations, as well as their ability successfully to do so. Nevertheless, our re-examination has identified a number of actions we can take that will substantially strengthen even further our cost accounting safeguards that we have applied to the BOCs and other Tier 1 LECs.[64] Similarly, although this proceeding is being initiated in response to the *California* decision, which addresses cost accounting safeguards applicable to the BOCs, we propose to apply each of our strengthened safeguards to all Tier 1 LECs. Accordingly, we propose to require that: (1) all carriers treat enhanced services as nonregulated activities for accounting and cost allocation purposes; (2) the independent auditors be directed to provide the same level of assurance in their required audits as that undertaken in a financial statement audit engagement; (3) the Common Carrier Bureau study means of achieving greater uniformity in the carriers' cost allocation manuals and, if appropriate, take the steps necessary to accomplish this goal: (4) the carriers quantify the effect of cost allocation manual changes when such changes are submitted to the Commission; and (5) the Bureau study whether to establish a reasonable threshold for determining the materiality of errors and omissions discovered in the independent audits of carrier filings, and, if appropriate, take the steps necessary to implement such a threshold. Appendix A contains new and revised rule language implementing these proposed changes and codifying pre- existing manual filing and independent audit requirements. We believe that these measures will provide regulated service ratepayers and the BOCs' (and other Tier 1 LECs') competitors with important additional protections against cross-subsidization.

27. The first of these measures involves continued nonregulated treatment of enhanced services for accounting and cost allocation purposes. The costs of nonregulated activities are removed from the carriers' prescribed Part 32 accounts prior to the jurisdictional separations process.[65] It is essential that telephone company shareholders, not regulated service ratepayers, bear the costs of telephone company nonregulated operations. Isolating the cost of nonregulated activities before applying jurisdictional separations procedures is a cost-effective means of achieving this goal. Under this approach, the carriers are not required to isolate enhanced service costs in each jurisdiction, because all such costs have been allocated to the nonregulated category through a single set of allocation procedures subject to an independent audit.[66]

28. The second proposal involves strengthening the annual independent audits of carrier cost allocation data filed with the Commission. Based on the Bureau's review of the carriers' 1988 and 1989 independent audits, we believe that these audits can be improved in order to increase further both the reliability of this process and its value as a means of assisting the Commission in the most effective use of our own auditing resources. Specifically, we believe that the independent auditors should provide the same level of assurance as that provided with a financial statement audit engagement. An attest engagement results in an opinion by the auditor about the reliability of a written assertion that is the responsibility of another party. A financial statement audit engagement, by contrast, results in an opinion by the auditor whether the company's financial statements are presented fairly, in all material respects, in conformity with generally accepted accounting principles. The audit must include an examination, on a test basis, of evidence supporting the amounts and disclosures in the financial statements, an assessment of the accounting principles used and of significant estimates made by management, and an evaluation of the overall financial statement presentation. The professional standards of field work for financial statement audit engagements specifically require auditors to obtain evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for the statements under examination, and to evaluate internal controls when those controls are relied upon in determining the extent of auditing procedures. We tentatively conclude that these standards' requirements for the additional examination of source data and for the testing of allocation procedures and reported results are necessary to satisfy fully the Commission's cost allocation require-

ments. We propose to require such a heightened level of assurance for all future independent audits required under our rules. [67]

29. This Commission also tentatively concludes that the joint cost allocation process could be improved further through efforts to achieve greater uniformity in the carriers' cost allocation manuals. The Commission has allowed each carrier to file its own cost allocation manual subject to public review and comment and to Commission review. The Commission initially declined to require uniformity in the cost allocation manuals, stating that it was important, at the beginning of the cost allocation process, to allow the carriers to develop different solutions to cost allocation problems so that the Commission and the carriers could evaluate which methods worked best. At the same time, however, the Commission expressed an expectation that the carriers would gradually adopt procedures from each others' manuals, making the manuals more alike. At this point in time, we believe that both the carriers and the Commission have had an adequate opportunity to examine disparate means of dealing with cost allocation issues, and determine which methods produce the best results. We now believe that the cost allocation process would benefit from efforts to increase uniformity. Accordingly, this Commission proposes to direct the Common Carrier Bureau to take the appropriate action on delegated authority to achieve greater uniformity in the cost allocation manuals.[68]

30. In addition, we propose to require carriers to provide estimates, at the time they file future manual revisions, of the dollar effects that these revisions will have on joint cost allocation results. This will assist the Commission staff and other interested parties in focusing attention on the most significant revisions. We further propose to direct the Bureau to examine whether to establish a specfic standard or standards for the materiality of errors and omissions discovered in the independent audit process and, if appropriate, take steps to implement such standards. Establishing specific standards, if practicable, would further define the obligations of the independent auditors and would affect the kinds of procedures they employ in the conduct of their audits as well as the level of scrutiny,[69] and thus could help ensure the correction of all significant cost allocation errors or omissions discovered in these audits.

31. Thus, after re-examination, we tentatively conclude that a set of nonstructural safeguards, particularly as strengthened by the proposals herein, can effectively protect against possible improper cross-subsidization due to misallocation of BOC costs between basic and enhanced services. We recognize that this approach represents a change from the *BOCSeparation Order*. While we were concerned in that proceeding that effective accounting safeguards against cross-subsidization might be difficult to develop, we have now developed, implemented, and enforced such safeguards and believe that they are indeed effective. In this regard, there have been a number of recent Rule Making and enforcement actions (not before the Court in *California)* demonstrating our commitment and ability to deter, and if it occurs, to detect and remedy, cross-subsidization. Implementation of our detailed cost accounting regime has resulted in FCC actions to prevent or remedy improper cost allocations, and thereby limited BOC opportunities to cross-subsidize. Implementation of the added safeguards proposed in this *Notice* will, as a whole, strengthen the effectiveness of our cost accounting safeguards, and thus further limit BOC cross-subsidization opportunities. Furthermore, implementation of price cap regulation for the BOCs will sever the direct link between any improperly shifted costs and regulated basic service prices, and thereby should reduce BOC incentives to cross-subsidize.

32. We therefore tentatively conclude that our regulations will protect ratepayers and others from the effects of any misallocation of costs between basic and enhanced services, and that structural separation is not now necessary to guard against cross-subsidization. In light of this conclusion and the public interest benefits of permitting integrated BOC enhanced service operations,[70] we tentatively conclude, contrary to the Commission decision in late 1983 in the *BOC Separation Order*, that the costs of a structural separation requirement outweigh any benefits. To the extent cost accounting safeguards may involve any diminution in protection against cross-subsidization, the danger of this is outweighed by the benefits of integration. We seek comment on these tentative conclusions and on our proposals to strengthen our cost accounting safeguards. Although our tentative view is that reliance on nonstructural safeguards is the best means for accomplishing our public interest goals, parties may also comment on alternative approaches. To the extent that any parties support retention of structural separation, we ask that they provide evidence to show why they believe structural separation to be more effective than nonstructural safeguards in detecting and deterring discrimination and cross-subsidization, and that they identify the specific benefits of structural separation that would outweigh the costs -- in terms of lost public benefits -- of structural separation.

3. Safeguards Against Discrimination

33. In the *Computer III Phase I* and *Phase II* orders, the Commission established a number of nonstructural safeguards to protect against possible BOC discrimination against their competitors in the provision of access to underlying basic services. In the *Phase I Order*, the Commission adopted CEI requirements to ensure that unaffiliated ESPs could obtain nondiscriminatory access to underlying basic network services. Thus, the BOCs were required to provide their ESP competitors with "equal access" interconnections to basic network services at the same rates that the BOCs themselves paid.[71] As a result, the basic services used by the BOC enhanced service operations had to "be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services."[72] As an interim measure, the Commission allowed the BOCs to provide enhanced services on an integrated basis pursuant to Commission-approved service-specific CEI plans, prior to implementing ONA.[73]

34. The Commission also required that the BOCs implement ONA, which extends CEI principles to the overall design of the BOCs' basic networks. In addition, ONA requires that the BOCs give their competitors access to BOC network functionalities by tariffing unbundled basic service building blocks (basic service elements or BSEs). After significant revisions and improvements in the plans resulting from the BOCs working with the ESP industry

under Commission direction, the Commission approved the BOCs' amended ONA plans on May 8, 1990, subject to minor modifications.[74]

35. The Commission adopted additional nonstructural safeguards in the *Phase II Order*. First, the Commission required that the BOCs file quarterly nondiscrimination reports concerning the timing of installation and maintenance, and the quality and reliability, of the basic services used by the BOCs' competitors.[75] Second, the Commission adopted network information disclosure rules to ensure that independent ESPs obtained timely access to technical information related to new or modified network services affecting the interconnection of enhanced services to the network. Finally, the Commission established rules governing BOC and ESP access to CPNI.[76]

36. In reviewing the *Computer III* decisions, the *California* Court did not criticize the Commission's nondiscrimination safeguards. In fact, the Court stated that the record supported the Commission's conclusions that "ONA, CEI, and the growth of bypass technology will be effective in reducing the risk of BOC access discrimination,"[77] and that "lifting the structural separation requirements will benefit consumers of enhanced services by permitting the BOCs to operate more efficiently in the enhanced services market."[78] Thus, despite the decision to vacate the *Computer III* orders, the Court did not find fault with the Commission's nonstructural safeguards designed to prevent discrimination against the BOCs' competitors in access to basic services.

37. In this proceeding, we propose to readopt the *Computer III* nonstructural safeguards against discrimination except for ONA, which we have adopted in our companion order,[79] and for our CPNI requirements, which are discussed separately below. The Commission's experience to date confirms the *Computer III* conclusion that these nonstructural safeguards, implemented within the ONA framework, are sufficient to guard against discrimination. We have received very few complaints from ESPs concerning discriminatory access to the BOC networks. Indeed, many of the later CEI plans filed by the BOCs generated little or no public comment. We seek comment on our tentative reaffirmation of our *Computer III* conclusion. We also note that this proposal includes readoption of our *Computer III* decisions to eliminate both the capitalization plan requirement[80] and the prohibition against the regulated BOC company and its affiliates performing software development for one another. Accordingly, we seek comment on our proposal to reinstitute the pre-existing nonstructural safeguards designed to ensure nondiscriminatory access to BOC basic services. We also ask parties to comment on any relationship between LEC price cap regulation and those nonstructural safeguards that are designed to protect against possible discrimination. We also seek comment on readopting the *Computer III* decisions concerning capitalization plans and software development independent of the broader regulatory regime ultimately adopted in this proceeding.

38. While we propose generally to reinstitute the nondiscrimination safeguards, we request comment about whether we should modify our CPNI rule for enhanced services, which addresses the question of access by the BOCs and by independent ESPs to a customer's CPNI for the purpose of marketing enhanced services. In this area, the Commission has balanced the goals of promoting efficiency in BOC delivery of enhanced services to customers, protecting customer expectations of privacy, and promoting competitive equity in the provision of enhanced services by the BOCs and independent ESPs. Under the current rule,[81] BOC enhanced service personnel are allowed generally to access a customer's CPNI for marketing purposes, but the customer has a right to require the BOC to withhold CPNI from its enhanced service personnel. Upon customer request, the BOCs are required to release CPNI to unaffiliated ESPs on the same terms and conditions that it is made available to their own enhanced service personnel.[82] Thus, if a customer does not affirmatively choose to withhold its CPNI from BOC enhanced service personnel or release it to unaffiliated ESPs, BOC enhanced service personnel can access a customer's CPNI for marketing purposes but independent ESPs cannot.

39. In the *BOC ONA Reconsideration Order* this past spring, we noted that BOC implementation of the current rule may give rise to legitimate concerns regarding the important issues of informed customer choice and competitive equity. We found that the implementation of the rule could affect "whether a customer purchases BOC enhanced services before it is aware either that independent enhanced service providers exist or that those providers can make use of whatever benefits that CPNI provides in structuring a service offering for that customer's needs." We decided that the BOCs "must evidence a good faith effort to address any legitimate concerns of their ESP competitors on this issue," and specifically required that the BOCs include proposed solutions to these issues in their amended ONA plans to be filed in April 1991.[83]

40. Although the *California* Court did not find fault with the Commission's nonstructural safeguards against possible discriminatory conduct, we have decided to expand and accelerate the scope of our review of the CPNI safeguard applicable to BOC provision of enhanced services. We here request not only proposals for improving the implementation of the current CPNI rule, but also comment on possible modifications to the current CPNI rule, such as applying a prior authorization requirement to the BOCs as well as to independent ESPs in some or in all circumstances.[84] Parties should demonstrate in their comments how their proposed rule or implementation procedures effectively balance considerations of efficiency, competitive equity, and privacy. Parties proposing to change the current rule should also address the propriety of various requirements that implement the current rule, such as requirements for the annual notification of multiline business customers and for a computerized password/ID system.

III. PREEMPTION

A. Background

41. As explained above, in *Computer II* the Commission permitted AT&T and its operating companies to provide enhanced services only through corporate affiliates fully separated from their basic services operations. The Commission preempted the states from exempting AT&T and its operating companies from the Commission's structural separation requirements for intrastate regulatory purposes.[85] The Commission did not, however, preclude states from imposing safeguards to protect intrastate ratepayers in addition to those created by the Commission,[86] and states were free to impose structural separation requirements on the unregulated activities of GTE and

other ITCs.[87] In the *BOC Separation Order* the Commission similarly preempted the states from altering the structural separation requirements imposed on the BOCs.[88]

42. In *Computer III* the Commission concluded that it would be in the public interest to permit AT&T and the BOCs to integrate their provision of basic and enhanced services pursuant to nonstructural safeguards. The Commission found that state structural separation requirements would interfere with federal policies, and that facilities and services used by carriers for the provision of basic and enhanced services could not practicably be separated into interstate and intrastate components in a manner that would permit application of conflicting federal and state safeguards.[89] Accordingly, the Commission preempted the states from imposing structural separation requirements or inconsistent nonstructural safeguards on the enhanced service operations of AT&T and the BOCs.[90] The Commission also found that it would be anomalous to have more stringent safeguards applicable to the enhanced services of the ITCs than applied to the BOCs, in view of the ITCs' smaller potential for engaging in anticompetitive conduct. Therefore, the Commission preempted states from imposing on the ITCs structural separation requirements or nonstructural safeguards more stringent than those applied to the enhanced service operations of AT&T and the BOCs.[91]

43. *California v. FCC* vacated the Commission's *Computer III* preemption decisions. The Court was not persuaded that the Commission had adequately justified preemption of state structural separation requirements and of inconsistent nonstructural safeguards. The Court found that the Commission had failed to demonstrate that *all* state-imposed structural separation requirements would negate the federal interest in permitting AT&T and the BOCs to offer integrated enhanced services because the *Computer III Order* failed to address the possibility that some enhanced services might be offered on a purely intrastate basis. The Court stated that the Commission had made a plausible argument that some forms of state structural separation requirements -- for instance, those that could require physical separation of intrastate enhanced and basic service facilities -- could negate federal policies permitting structural integration.[92] The Court found, however, that the Commission had failed to explain how the possibility that some forms of state structural separation requirements could negate federal policy justified the Commission's preemption of *all* state structural separation requirements.[93]

44. The Court also found that the Commission had failed to justify the breadth of the preemption of inconsistent state nonstructural safeguards applicable to AT&T and the BOCs.[94] The Court found inadequate as well the Commission's explanation for preemption of state nonstructural safeguards applicable to the ITCs more stringent than those imposed by the Commission on AT&T and the BOCs.[95] According to the Court, the Commission stated only that it is desirable that the ITCs not be subject to a greater degree of regulation than the BOCs.[96]

B. Discussion

45. This Commission is committed to the development of a strong information services market that makes new, innovative services available to the general public as well as to large businesses. Our goals, which we believe are shared by many state commissions, are to promote the efficient provision of enhanced and basic services by common carriers, while protecting against anticompetitive behavior. In this *Notice*, we tentatively conclude that the best way of achieving these goals at the federal level is to permit the BOCs to develop and market interstate enhanced services on an integrated basis, subject to the safeguards described above. ITCs, under prior Commission determinations, are permitted to integrate their basic and enhanced services. With the adoption of the *Report and Order* today, we have readopted nonstructural safeguards for AT&T's provision of enhanced services.[97] This *Notice* considers the extent to which this Commission might find it necessary to preempt state safeguards applicable to provision of intrastate enhanced services by these carriers.

46. It is inevitable that the various state and federal regulatory authorities will have different perspectives and experiences, and this may lead state commissions to adopt safeguards that are at variance with each other, and with the federal safeguards. Some state requirements are likely to be very similar to federal requirements; others may be complementary. Section 2(b) of the Communications Act generally leaves to the states regulatory jurisdiction over intrastate communications. We may, however, preempt inconsistent state regulation that as a matter of economics and practicality of operation "would necessarily thwart or impede" federal regulation.[98] We propose in this *Notice* to preempt only state regulation of intrastate communications that would necessarily thwart or impede federal regulation.

47. At the same time, we must ensure that disparate federal and state regulatory requirements do not undermine the efficiency of interstate communications. The enhanced services market generally is national or regional in scope, and a degree of certainty and uniformity may be necessary to enable the enhanced services market to develop in the way that both state commissions and this Commission desire. Ensuring a rapid and efficient nationwide communications system is one of the explicitly stated purposes for creation of this Commission,[99] and a mandate which we are committed to fulfilling. Thus, we emphasize that the Commission has jurisdiction over interstate enhanced services,[100] and our jurisdiction over interstate communications encompasses communications over physically intrastate facilities used in those communications.[101]

1. Structural Separation Requirements

48. In *Computer III* the Commission preempted states from requiring AT&T, the BOCs, and ITCs to provide enhanced services through a separate corporate entity with separate facilities and personnel. In this proceeding we propose to preempt those categories of state structural regulation that, as a practical matter, prevent these carriers from integrating their interstate basic and enhanced service operations, thereby thwarting or impeding a valid federal regulatory goal.

49. It is possible that some state structural regulation may not impermissibly thwart federal policies in this area. For example, upon initial analysis, it appears that a simple requirement that a carrier establish a separate corporate entity for provision of intrastate enhanced services by itself may not make it impractical for carriers to provide interstate basic and enhanced services on an integrated basis. It appears to us, however, that a state requirement that separate facilities or personnel be used

for provision of intrastate enhanced services would, as a practical matter, make it impossible for carriers to integrate their interstate basic and enhanced service operations. For instance, as the *California* Court noted, it would appear that general state requirements that carriers use separate facilities to provide intrastate enhanced services would almost inevitably require a separation of facilities used to provide interstate basic and enhanced services because the same facilities are ordinarily used to provide both interstate and intrastate services.[102] If such state structural regulation were not preempted, many of the public interest benefits we have identified as associated with integration would be lost.

50. We seek comment on the practical ability of AT&T and the BOCs to separate different types of facilities and personnel functions for provision of intrastate enhanced services while simultaneously integrating interstate basic and enhanced services pursuant to federal nonstructural safeguards. Specifically, we seek comment on state regulation requiring separate communications facilities and equipment, computer facilities and software, and other facilities such as real estate and vehicles. We also seek comment on the effect of state structural regulation on the following personnel functions: general management, operations, marketing, installation and maintenance, and research and development. These types of facilities and personnel functions should not be regarded as rigidly divided categories. They will in some cases overlap and be closely related. Commenters are requested to delineate special features that weigh for, or against, permitting states to apply structural separation requirements to these types of facilities and personnel functions, or to any other BOC activities. Commenters should fully support claims of economic, technical, or other practical impossibility. If the record shows that state regulations requiring separation of any of these facilities, functions, or activities would thwart or impede the ability of AT&T and the BOCs to integrate their interstate basic and enhanced services, the Commission proposes to preempt those state requirements.

51. In *Computer III* the Commission preempted state structural separation requirements applicable to the ITCs, as well as to AT&T and the BOCs, thereby permitting ITCs to provide integrated interstate enhanced and basic services. We tentatively conclude that the scope of any preemption of state structural requirements adopted in this proceeding likewise should not differ when applied to the ITCs. We solicit comment on this tentative conclusion. Any commenter advocating a different scope of preemption should identify the considerations justifying such a different result, and should define with specificity the suggested scope of preemption.

2. Network Disclosure Rules

52. In *Computer III* we applied special network disclosure rules to the BOCs and AT&T.[103] In this proceeding we propose to re-establish the *Computer III* network disclosure rules applicable to the BOCs. In CC Docket No. 90-368 the Commission is today re-establishing the *Computer III* network disclosure rules applicable to AT&T. These network disclosure obligations are designed to address the potential that these carriers, in the absence of structural separation, may discriminate against their enhanced service competitors in designing new network services or changing network technical specifictions. These rules help ensure that independent ESPs can obtain, on a nondiscriminatory basis, technical and marketing information related to any new or modified network service affecting interconnection of enhanced services to the network. In general, disclosure subject to a protective agreement is required to independent ESPs at the "make/buy" point, *i.e.*, the point in time at which the carrier decides to make itself, or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface. Public disclosure generally is required at least twelve months before introduction of a new or modified network service.[104] These rules strike a balance between assuring that independent ESPs receive network information on a timely basis and preventing premature disclosure that could impair carriers' development efforts and inhibit network innovation.

53. We tentatively conclude that it will be impossible to apply different state and federal timing requirements for initial disclosure of this network information. In our view, disclosure is inseverable for interstate and intrastate regulatory purposes because, by definition, initial disclosure can occur only once. A state network disclosure rule that mandates disclosure at an earlier time, or prevents disclosure at the time specified in the federal rule, effectively negates the timing specified in the federal rule. Accordingly, we propose to preempt that part of any state network disclosure rule that requires initial disclosure at a time different than that in the federal rule.[105] We do not propose, however, to preempt state procedures that require broader dissemination of this information, but do not affect the timing of the disclosure. We solicit comment on these proposals and on the potential for state network disclosure rules generally to frustrate the ability of AT&T and the BOCs to provide interstate integrated enhanced services. We also solicit comment on whether state network disclosure rules applicable to the ITCs could frustrate their ability to integrate interstate basic and enhanced services.

3. Customer Proprietary Network Information Rules

54. Under *Computer III*, the Commission established CPNI safeguards identical to those applied to the integrated provision by AT&T and the BOCs of CPE and basic services. Balancing efficiency, privacy, and competitive equity considerations, those rules generally permit the carriers' enhanced service operations to access CPNI, but require carriers to provide customers with the right to direct that their CPNI be withheld from the carrier's enhanced services personnel and/or released to other enhanced service vendors. Thus, ESPs are required to obtain a customer's permission in order to access that customer's CPNI, whereas AT&T and the BOCs may access this CPNI without such prior authorization. As set forth earlier in this *Notice*, we are proposing to re-examine the CPNI safeguard as applied to the integrated provision by the BOCs of interstate basic and enhanced services. In a companion order, we are readopting the *Computer III* CPNI restrictions applicable to AT&T's integrated enhanced service operations. States may wish to adopt CPNI rules for intrastate regulatory purposes that differ from FCC rules. We seek comment on whether any preemption of state CPNI regulation differing from federal CPNI safeguards is appropriate or necessary. We also seek comment on whether any preemption of state CPNI requirements should also apply to the ITCs.[106] Parties arguing for preemption of some types of state CPNI regulations

should craft their proposals so that the proposals affect only those narrow categories of state requirements that would thwart or impede federal policy.

4. Nondiscrimination Reporting Requirements

55. In this proceeding we are proposing to re-establish the nondiscrimination reporting requirements applicable to the BOCs. In a companion order, we are readopting reporting requirements applicable to AT&T. The purpose of these requirements is to reduce the potential for the BOCs and AT&T to discriminate in the timing or quality of their provision of basic services to their enhanced service competitors or their competitors' customers. Under these requirements, AT&T and the BOCs report quarterly on the timing of installation and maintenance of, and file annual affidavits on the quality of, basic services provided under CEI plans and ONA.[107] The ITCs are not subject to federal nondiscrimination reporting requirements. We solicit comment on which, if any, state reporting requirements differing from federal requirements would thwart or impede those objectives, or the ability of carriers to integrate provision of interstate basic and enhanced services.

IV. WAIVER OF COMPUTER II

56. After the Ninth Circuit vacated *Computer III*, the BOCs filed a joint petition for an interim waiver of the *Computer II* rules.[108] The Common Carrier Bureau granted an interim waiver of *Computer II* to allow the BOCs to offer enhanced services on an integrated basis to existing and new customers under previously approved CEI plans.[109] The Bureau, however, directed the BOCs to refrain from filing any new CEI plans, to withdraw all pending CEI plans before the Bureau but not yet approved, and to discontinue the integrated planning and development of BOC enhanced services except for those services subject to an approved CEI plan. The waiver order requested comment on whether the waiver should continue throughout the pendency of the remand proceeding, and if so, under what conditions.[110] In light of our proposal to adopt nonstructural safeguards for BOC provision of enhanced services, we conclude that it would be in the public interest to extend the waiver until the completion of the remand proceeding. We take this opportunity to clarify certain aspects of the Bureau waiver, but decline to expand its scope.

57. Most commenters support an extension of the interim waiver for the duration of this Rule Making.[111] Generally, these parties state that it is in the public interest to waive the *Computer II* rules requiring structural separation for BOC enhanced service operations until conclusion of these proceedings in order to avoid disruption for the thousands of customers that currently subscribe to BOC enhanced services.[112]

58. Only three parties, MCI, ATSI and Mid Atlantic, oppose extending the waiver during the pendency of the remand proceeding.[113] MCI and ATSI assert that to obtain a waiver of the *Computer II* rules, a petitioner must demonstrate that concerns about cross-subsidization are outweighed by the possibility of imposing unreasonable costs upon consumers, or the unavailability of an enhanced service if the waiver is not granted.[114] MCI contends that the BOCs have failed to make the showing necessary to justify a waiver.[115] MCI, ATSI and Mid Atlantic also oppose an extension of the waiver on the grounds that the Commission's cost accounting and nonstructural safeguards are not effective in protecting ratepayers and consumers against anticompetitive behavior by the BOCs.[116]

59. For the reasons stated below, we conclude that a limited interim waiver of the Commission's *Computer II* rules to permit the BOCs to offer enhanced services on an integrated basis to existing and new customers pursuant to previously approved CEI plans is in the public interest. The narrow waiver we grant today will avoid unnecessary disruption to customers and the industry, with little attendant risk of anticompetitive behavior.

60. We agree with those parties that state that establishing structural separation requirements on BOC enhanced service operations during the remand proceeding is likely to impose substantial costs on ratepayers and enhanced service customers.[117] To comply with such a requirement, the BOCs would have to form and organize a separate subsdiary, maintain separate books of account, hire separate officers and operating personnel and utilize computer equipment and telecommunications facilities separate from those used in the provision of regulated services.[118] Indeed, in light of the limited duration of this proceeding, the significant costs involved in forming a fully separate subsdiary and the loss of efficiencies of integrated operations, failure to extend this waiver might force the BOCs to suspend some enhanced service offerings and make some enhanced services unavailable in the marketplace.[119] These costs, and the risk of loss of service, will prove to be unnecessary if we adopt our proposed nonstructural safeguards.[120] Thus, requiring structural separation for BOC enhanced services during this interim period would create severe customer disruption and dislocation.[121]

61. Furthermore, we have responded to the *California* Court's concerns. For example, we have prevented the BOCs from expanding the enhanced services that they provide on an integrated basis. They instead are limited to those services that have been the subject of notice and comment and individualized Commission scrutiny in the CEI process. In addition, we are confident that our current cost accounting rules and CEI requirements, as strengthened by interim Bureau actions, will minimize the potential risk of anticompetitive behavior by the BOCs during the pendency of the Rule Making proceeding.[122] Therefore, we have determined that extending the limited waiver granted by the Bureau would serve the public interest by preventing unnecessary customer dislocation and industry disruption with little attendant risk of anticompetitive behavior by the BOCs.[123] We believe our conclusion is consistent with relevant case law. Courts have upheld an agency's authority to adopt interim measures to prevent industry disruption after agency rules have been vacated, and these interim measures may remain in effect while the agency conducts remand proceedings.[124]

62. Several parties also request that we expand the scope of the interim waiver and permit the BOCs to file new CEI plans and to continue integrated planning and development for new enhanced services.[125] U S West requests the right to amend existing CEI plans to add new, "related" enhanced services.[126] Two BOCs also request that the Commission clarify whether the BOCs can file permanent CEI plans for enhanced services presently offered under a market trial waiver upon expiration of that trial.[127] Several BOCs urge us to waive the *Computer II* restriction prohibiting joint research and development for

software."[128] Finally, a few BOCs request that we define "planning and development."[129] Several parties other than the BOCs assert that any waiver should be limited to the terms of the *Interim Waiver Order*. "[130]

63. We decline to expand the scope of the waiver beyond the *Interim Waiver Order*, but take this opportunity to clarify the parameters of the waiver. During the pendency of this proceeding, the BOCs may not file new CEI plans or engage in integrated planning or development of enhanced services other than those for which CEI plans have been approved. We recognize that the scope of the waivers for AT&T and the BOCs are quite different, but determine that this different treatment is appropriate. The Commission's decision to substitute nonstructural safeguards for structural separation for the BOCs was challenged and briefed before the Court of Appeals; the Commission's decision on structural relief for AT&T was not. It was not necessary to limit the scope of AT&T's waiver, but it is necessary to place limits on the BOC waiver in order to be consistent with the Court's decision. "[131] Moreover, services that have not yet been approved do not raise the customer disruption issues that have led to our decision to grant a limited interim waiver for BOC enhanced services that are the subject of approved CEI plans. To the extent that the BOCs offer enhanced services through a separate subsidiary, they are free to engage in joint research and development, provided that they comply with the *Computer II* requirement for full compensation, which may be achieved through compliance with our affiliate transaction rules."[132]

64. We also wish to clarify several aspects of this waiver. The BOCs may not file new CEI plans or engage in integrated planning and development for enhanced services that are "direct outgrowths" or "logical extensions" of enhanced services offered under approved CEI plans."[133] Second, the BOCs may not amend existing CEI plans to add "related" enhanced services or file permanent CEI plans for enhanced services offered pursuant to a market trial waiver."[134] The *California* decision found that the Commission had not adequately justified use of cost accounting safeguards to protect against cross-subsidization. We think it important, during the pendency of this proceeding, to safeguard against concerns identified by the Court by not generally permitting the BOCs to expand the enhanced services they can provide on an integrated basis. Administratively, we want to avoid questions of line-drawing that these BOC requests would appear to entail."[135] We will, however, permit companies that currently do software research and development on a joint basis to continue to do so for the duration of the Rule Making. Our proposed regulations permit carriers to do joint research and development for software."[136] It appears unnecessarily disruptive to compel a carrier to move its software development for enhanced services into a separate subsidiary when that removal may be temporary."[137] If we decide not to alter the software rule, we will require carriers to separate their software development at that time.

65. In the companion ONA proceeding, Bell Atlantic raises an issue regarding capitalization plans. Bell Atlantic asks that the Commission reinstate the *Computer III* decision eliminating the requirement that the BOCs have a capitalization plan approved before a separate subsidiary may operate. Our proposal, if adopted, would eliminate the capitalization plan requirement."[138] It appears unnecessarily burdensome and not particularly useful to require the BOCs to file capitalization plans for any interim *Computer II* subsidiaries they may establish. During the pendency of this proceeding, the BOCs may establish separate subsidiaries without filing capitalization plans, provided that they comply with the Commission's accounting safeguards. Should we decide not to eliminate the capitalization plan rule, we will require the BOCs to file capitalization plans at that time.

66. Finally, some BOCs have asked us to clarify the meaning of planning and development. It is neither reasonable, nor necessary, to prohibit BOC employees from thinking any thoughts that might lead to the development of an enhanced service."[139] When a company develops a business plan, however, and assigns resources to a specific service, we will consider, for purposes of this waiver, that it is engaged in planning and development. Accordingly, the BOCs must use separate subsidiaries to conduct technology or market trials, and to prepare feasibility studies for enhanced services that are not the subject of an approved CEI plan. The BOCs, however, may perform on an integrated basis activities that precede planning and development, including the identification of customer needs, general market research, and analysis of service or product alternatives."[140]

V. REGULATORY FLEXIBILITY ACT ANALYSIS

67. We certify that the Regulatory Flexibility Act"[141] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this *Notice* in the Federal Register.

VI. PAPERWORK REDUCTION ACT ANALYSIS

68. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. EX PARTE REQUIREMENTS

69. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction

of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

70. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding; or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

71. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

72. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order. For purposes of this proceeding, we incorporate the record before the Commission in the *Computer III* docket.

VIII. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS INVITED on these proposals."[142]

74. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before February 15, 1991, and reply comments SHALL BE FILED with the Secretary on or before March 18, 1991. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

75. IT IS FURTHER ORDERED, that a waiver of the *Computer II* rules IS GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Proposed Amendments to the Code of Federal Regulations

Title 47 of the C.F.R., Part 64, is proposed to be amended as follows:

Part 64 -- Miscellaneous Rules Relating to Common Carriers

1. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218.

2. New section 64.903 is added to read as follows:

64.903 Cost Allocation Manuals

(a) Each local exchange carrier with annual operating revenues of $100 million or more shall file with the Commission a manual containing the following information regarding its allocation of costs between regulated and nonregulated activities:

(i) A description of each of the carrier's nonregulated activities;

(ii) A list of all the activities to which the carrier now accords incidental accounting treatment and the justification therefor;

(iii) A chart showing all of the carrier's corporate affiliates;

(iv) A statement identifying each affiliate that engages in or will engage in transactions with the carrier and a description of the nature, terms and frequency of each transaction;

(v) A table showing, for each account containing costs incurred in providing regulated services, the cost pools within that account, the procedures used to place costs into each cost pool, and the method used to apportion the costs within each cost pool between regulated and nonregulated activities; and

(vi) A description of the time reporting procedures that the carrier uses, including the methods or studies designed to measure and allocate non-productive time.

(b) Each carrier shall ensure that the information contained in its cost allocation manual is accurate. Carriers must update their manuals at least quarterly, except that changes to the sections dealing with time reporting and cost allocation procedures must be filed at least 60 days before the carrier plans to implement the changes. Proposed changes in time reporting and cost allocation procedures must be accompanied by a statement quantifying the impact of each change on regulated operations. The Chief, Common Carrier Bureau may suspend any such changes for a period not to exceed 180 days, and may thereafter allow the change to become effective or to prescribe a different procedure.

(c) The Commission may by order require any other communications common carrier to file and maintain a cost allocation manual as provided in this section.

3. New section 64.904 is added to read as follows:

64.904 Independent Audits

(a) Each local exchange carrier required by this Part or by Commission order to file a cost allocation manual shall have performed annually, by an independent auditor, an audit that provides a positive opinion on whether the carrier's cost allocation methodologies used in preparing reports to the Commission are in conformity with its cost allocation manual and whether the reported results are an accurate application of those methodologies and fairly present the financial results of the company's operations. In conducting this audit, the auditors shall obtain evidential matter through inspection, observation, inquiry and confirmation to afford a reasonable basis for the statements under examination. They shall also evaluate and report on the internal controls when those controls are relied upon in determining the extent of auditing procedures.

(b) The report of the independent auditor shall be filed at the time that the local exchange carrier files the annual report required by Section 43.21(f) of this Chapter.

APPENDIX B

Parties Filing Comments

American Newspaper Publishers Association (ANPA Comments)

Ameritech Operating Companies (Ameritech Comments)

Association of Telemessaging Services International, Inc. (ATSI Comments)

Bell Atlantic Telephone Companies (Bell Atlantic Comments)

BellSouth Corporation (BellSouth Comments)

CompuServe Incorporated (CompuServe Comments)

MCI Telecommunications Corporation (MCI Comments)

NYNEX Telephone Companies (NYNEX Comments)

People of the State of California and the Public Utilities Commission of the State of California (California Comments)

Public Service Commission of the District of Columbia (DC PSC Comments)

Southwestern Bell Telephone Company (SWBT Comments)

United States Telephone Association (USTA Comments)

U S West, Inc. (U S West Comments)

Parties Filing Replies

American Newspaper Publishers Association (ANPA Reply)

Ameritech Operating Companies (Ameritech Reply)

Bell Atlantic Telephone Companies (Bell Atlantic Reply)

BellSouth Corporation (BellSouth Reply)

Boston Technology, Inc. (Boston Reply)

CompuServe Incorporated (CompuServe Reply)

Florida Telemessaging Coalition

MCI Telecommunications Corporation (MCI Reply)

Mid-Atlantic Association of Enhanced Service Providers (Mid-Atlantic Reply)

NYNEX Telephone Companies (NYNEX Reply)

Pacific Bell and Nevada Bell (Pacific Reply)

People of the State of California and the Public Utilities Commission of the State of California (California Reply)

Public Service Commission of the District of Columbia (DC PSC Reply)

Southwestern Bell Telephone Company (SWBT Reply)

U S West, Inc. (U S West Reply)

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Computer III*), CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration Order*), *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*), *Phase II Order vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir. pet. for rev. filed May 13, 1988).

[2] California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (*California*). The *Computer III* decisions before the Ninth Circuit were the *Phase I Order*, the *Phase I Reconsideration Order*, and the *Phase II Order*. Amendment of Sections 64.702 of the Commission's

Rules and Regulations, CC Docket No. 85-229, *Phase I Order*, 104 FCC 2d 958 (1986); *Phase I Reconsideration Order*, 2 FCC Rcd 3035 (1987); *Phase II Order*, 2 FCC Rcd 3072 (1987).

[3] We do not consider in this proceeding all the issues raised by the Ninth Circuit's opinion. On August 6, 1990, we issued a *Notice of Proposed Rule Making* that focused on certain *Computer III* decisions that were not addressed in the briefs before the Ninth Circuit, such as the adoption of Open Network Architecture (ONA) requirements and the application of nonstructural safeguards to AT&T's provision of enhanced services. Computer III Remand Proceedings, 5 FCC Rcd 5242 (1990). In a companion order, we today reinstate our ONA requirements established in the *Computer III* and *ONA* proceedings, regardless of whether the Commission ultimately readopts nonstructural, rather than structural, safeguards for the provision of BOC enhanced services. In that order, we also readopt nonstructural safeguards for AT&T's provision of enhanced services and decide a limited number of other *Computer III* issues. Computer III Remand Proceedings, CC Docket No. 90-368, FCC 90-415 (released December 17, 1990).

[4] The Ninth Circuit's vacation of the Commission's *Computer III* decision generally returned the industry to a *Computer II* regime. *See* Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714 (Com.Car.Bur. 1990) (*Interim Waiver Order*). Upon petition by the BOCs, the Common Carrier Bureau issued a limited interim waiver to allow the BOCs to continue offering enhanced services on an integrated basis pursuant to approved comparably efficient interconnection (CEI) plans. The Bureau invited comment on whether the Commission should extend the waiver until completion of the remand proceedings, and if so, under what conditions. *Id.* at 4715, para. 10.

[5] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), 77 FCC 2d 384 (1980) (*Final Decision*), *modified on recon.*, 84 FCC 2d 50 (1981) (*Reconsideration Order*), *modified on further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *affirmed sub nom.* Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[6] *Final Decision*, 77 FCC 2d at 428-430, paras. 114-118.

[7] *Id.* at 463-464, para. 208.

[8] *Id.* at 475-486, paras. 233-260; *Reconsideration Order*, 84 FCC 2d at 75-86, paras. 72-105; 47 C.F.R. § 64.702.

[9] 47 C.F.R. § 64.702.

[10] *Final Decision*, 77 FCC 2d at 487, para. 261.

[11] *Id.* at 479-480, para. 243. This prohibition against software develpment did not preclude the separate subsidiary from obtaining generic software embedded in customer premises equipment (CPE) from the regulated company. *Id.* at 480, para. 244.

[12] *Id.* at 480-481, paras. 247-248.

[13] *Phase I Order*, 104 FCC 2d at 1081, para. 247; 47 C.F.R. § 64.702(d)(2). Other carriers were required to make such disclosure reasonably in advance of implementation. *Id.* at 970, para. 15.

In 1983, the Commission required AT&T to disclose all technical information involving new network services or modifications in network services, as well as information relating to the timing of introduction, pricing, and geographic availability of new network services or capabilities, at the time AT&T provides such information to its separate subsidiary or to others for the benefit of its separate subsidiary. Computer and Business Equipment Manufacturers Association, *Report and Order*, 93 FCC 1226, 1238, para. 37 (1983). Also, the Commission required AT&T to disclose information involving joint research and development by AT&T and its separate subsidiary leading to the design or manufacture of any product affecting the network interface or relying on an interface not yet implemented, as well as information relating to the development of new network services or features at the request of the subsidiary. Such disclosure was required at the "make/buy" point, *i.e.*, at the time when AT&T decides to manufacture the product itself or to procure the product from an unaffiliated company. *Id.* at 1239, 1244-1245, paras. 40, 58, 60.

[14] *Final Decision*, 77 FCC 2d at 481, para. 249; 47 C.F.R. § 64.702(d)(3).

[15] Computer and Communications Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[16] 552 F.Supp. 131 (D.D.C. 1982), *affirmed sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[17] As part of the AT&T divestiture, the Court divided the BOC service territories into Local Access and Transport Areas that, with certain exceptions, define the geographic scope of toll service provided by the BOCs.

[18] 552 F.Supp. at 227. The Court subsequently authorized BOC provision of certain information transmission and gateway services, but prohibited BOC provision of information content. United States v. Western Electric Co., Inc., 714 F.Supp. 1 (D.D.C. 1988).

[19] 552 F.Supp. at 193, n. 251. For purposes of this *Notice*, the terms enhanced service and information service are used interchangeably. The District Court later required that the BOCs establish separate subsidiaries for the provision of noncommunications services as a condition of MFJ waivers. *See* U.S. v. Western Electric Co., 592 F.Supp. 846, 870-871 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). When Judge Greene modified the line of business restrictions in the first triennial review, the separate subsidiary requirement for the provision of noncommunications services was eliminated. U.S. v. Western Electric Co., 673 F.Supp. 525, 599 (D.D.C. 1987); United States v. Western Electric Co., 714 F.Supp. 1 (D.D.C. 1988), *motions for amendment and clarification denied*, 690 F.Supp. 22 (D.D.C. 1988).

[20] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, *Report and Order*, 95 FCC 2d 1117, 1120, para. 3 (1984) (*BOC Separation Order*), *affirmed sub nom.* Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (1984), *affirmed on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration Order*), *affirmed sub nom.* North American Telecommunications Association v. FCC, 772 F.2d 1282 (7th Cir. 1985).

[21] *BOC Separation Order*, 95 FCC 2d at 1129-1130, para. 28.

[22] *Id.* at 1140, para. 61.

[23] *See id.* at 1140-1145, para. 62-71.

[24] *BOC Separation Reconsideration Order* at para. 20.

[25] *See* note 1 *supra*.

[26] *Phase I Order*, 104 FCC 2d at 1010-1011, paras. 95-96.

[27] *Id.* at 1011-1092, paras. 98-99, 127-131, 147-166, 171-186, 190-193, 198-200, 210-222, 234-240, 246-255, 260-265.

[28] *See id.* at 1026-1077, paras. 127-131, 147-166, 210-222, 234-240.

[29] *California*, 905 F.2d at 1233, 1238.

[30] *Id.* at 1238.

[31] *See* note 4 *supra*.

[32] *California*, 905 F.2d at 1232.

[33] *Id.* at 1231.

[34] *Id.*

[35] *Id.*

[36] *Phase I Order*, 104 FCC 2d at 1007-1008, paras. 89, 91; *California*, 905 F.2d at 1232.

[37] *California*, 905 F.2d at 1238.

[38] *Id.* at 1236-1237.

[39] *Id.* at 1228, 1237.

[40] *Id.*

[41] *Id.* at 1238.

[42] *Id.* at 1238-1239.

[43] *See* paras. 12, 13 *supra*.

[44] Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order), recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order), further recon.*, 3 FCC Rcd 6701 (1988) (*Joint Cost Further Reconsideration Order), affirmed sub nom.* Southwestern Bell Corporation v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[45] Several parties appealed portions of the affiliate transaction rules to the United States Court of Appeals for the District of Columbia Circuit. That Court affirmed the Commission's decision. Southwestern Bell Corporation v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[46] 47 C.F.R. § 32.27.

[47] Tier 1 companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more. The initial class of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification are made if annual operating revenues shows a greater or lesser classification for five consecutive years. Commission Requests for Cost Support Material to be Filed with January 1, 1991 Access Tariff Revisions, DA 90-1499, para. 3 n. 7 (released October 24, 1990).

[48] *See e.g.*, Nevada Bell's Permanent Cost Allocation Manual and Pacific Bell's Permanent Cost Allocation Manual, 3 FCC Rcd 287, 299 (Com.Car.Bur. 1988). The Commission also rejected several other BOC proposals to allocate the cost of land and buildings, finding that they did not reflect actual usage. *See e.g.*, Southwestern Bell Telephone Company's Permanent Cost Allocation Manual, 3 FCC Rcd 447, 454-455 (Com.Car.Bur. 1988).

[49] The approved cost allocation manuals describe, in considerable detail, the methods each carrier uses to implement the Commission's cost allocation requirements. For example, Pacific's manual describes how it allocates salary and wage expenses between regulated and nonregulated activities. Pursuant to its manual, Pacific uses an analysis of job functions to directly assign or attribute costs to regulated and nonregulated operations whenever possible. It also uses job functions to assign costs to cost pools for allocation between regulated and nonregulated operations. When direct assignment or attribution is not possible, Pacific uses positive time reporting, which requires that employees account for all their time in 15-minute increments, and exception time reporting, which requires that employees occasionally working on nonregulated projects report such activities when the time involved exceeds one hour. In addition, Pacific uses special studies to allocate salary and wage expenses in the case of employees whose functions involve increments of time that are impractical to report. Pacific's manual details the application of each of these methods to Pacific's various employment categories. *See* Pacific Bell's Permanent Cost Allocation Manual, page 2-1, filed December 30, 1988, page 2-2, filed December 29, 1989, page 2-3, filed January 31, 1990, pages 2-5 to 2-9, filed June 29, 1990, pages 2-10 to 2-18, filed December 29, 1990.

[50] *Joint Cost Order*, 2 FCC Rcd at 1304, para. 47.

[51] *See* Responsible Accounting Officer (RAO) Letter 12, DA 88-1060, revised July 7, 1988.

[52] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order), recon.*, 3 FCC Rcd 6375 (1988).

[53] Part 32 contains the Uniform System of Accounts (USOA), which lists over 250 accounts that are used by the carriers to record the costs and revenues of their regulated and nonregulated activities.

[54] Part 64 contains the rules adopted in the *Joint Cost Order* that separate regulated costs from the costs of nonregulated activities.

[55] *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, 5 FCC Rcd 4177, 4179-4184, paras. 12-52 (Com.Car.Bur. 1990); Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3646-3647, paras. 81-85 (Com.Car.Bur. 1989), *recon. dismissed*, 4 FCC Rcd 5684 (Com.Car.Bur. 1989); applications for rev. pending; Local Exchange Acess Tariff Rate Levels, 4 FCC Rcd 5533, 5536-5540, paras. 28-64 (1989), Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68, 4 FCC Rcd 7939, 7940-7942, paras. 17-26 (Com.Car.Bur. 1989).

[56] *See* New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, *Order to Show Cause and Notice of Apparent Liability for Forfeitures*, 5 FCC Rcd 866 (1990).

[57] *Id.* at 870-871, paras. 31, 33. This $35.5 million represents the interstate portion of the apparently excessive charges imposed on ratepayers from 1984 through 1988. The remainder was assigned to the intrastate jurisdiction through the separations process. *Id.* at 872 n. 2, 873 n. 27.

[58] *Id.* NYT and NET denied any allegations of wrongdoing.

[59] New York Telephone Co. and New England Telephone and Telegraph Co. Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 5892 (1990), *pets. for recon. pending*. filed by Allnet Communication Services, Inc., November 2, 1990, Scott J. Rafferty, November 5, 1990, and New York State Department of Law and New York State Consumer Protection Board, November 5, 1990.

[60] New York Telephone Co., Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, FCC 90-384 (released November 9, 1990); New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, FCC 90-383 (released November 9, 1990); Pacific Bell, Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, FCC 90-385 (released November 9, 1990); Southwestern Bell Telephone Company, Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, FCC 90-386 (released November 9, 1990).

[61] We also note that Congress recently authorized significant increases in the FCC's statutory authority to assess forfeitures. Pub. L. No. 101-239, 103 Stat. 2131 (1989). The Commission can now assess forfeitures for accounting rule violations under sec-

tion 220(d) of the Communications Act of up to $6,000 per day of the continuance of each such violation, with no cap. Forfeitures against common carriers under section 503(b)(2)(B) of the Act can be assessed for as much as $100,000 per violation with no cap, or $100,000 per day in the case of continuous violations subject to a cap of $1 million. Previously, the Commission's forfeiture authority under section 220(d) was limited to $500 per day with no cap, and its forfeiture authority regarding common carriers under section 503(b)(2)(A) was limited to $2000 per violation, or per day of a continuous violation, with a cap of $20,000 for a single Notice of Apparent Liability. The 1989 legislation also increased the Commission's forfeiture authority respecting common carriers under sections 202(c), 203(e), 205(b), 214(d), and 219(b) of the Communication's Act.

[62] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC 90-314, at paras. 200, 213 (released October 4, 1990), *pets. for recon. pending*, filed November 19, 1990.

[63] To a limited extent, there may be some incentive under price cap regulation for a LEC whose earnings might be approaching the sharing mark to attempt to shift costs to the regulated side of its operations.

[64] The *Joint Cost Order* applied our most detailed cost accounting safeguards to all Tier 1 LECs, and not just to the BOCs. *Joint Cost Order*, 2 FCC Rcd at 1300, 1304-1305, paras. 4, 47-49.

[65] Because the Commission had preemptively deregulated enhanced services in *Computer III*, these services were classified as nonregulated for accounting and cost allocation purposes pursuant to the *Joint Cost Order* and the Commission's rules. *See* Section 32.23 (a) of the Commission's Rules, 47 C.F.R. § 32.23 (a). After the *California* decision, the Chief, Accounting and Audits Division directed the carriers to continue to account for enhanced services as nonregulated on an interim basis pending a Commission decision on permanent accounting treatment. Responsible Accounting Officer (RAO) Letter 16, DA 90-1408 (released October 18, 1990), *applications for rev. pending*, People of the State of California and the Public Utilities Commission of the State of California, filed November 16, 1990, Public Service Commission of the District of Columbia, filed November 19, 1990.

[66] Detariffing the Installation and Maintenance of Inside Wiring, *Second Further Notice of Proposed Rule Making*, CC Docket No. 79-105, 5 FCC Rcd 3407, 3409-3410 (1990). *See also Joint Cost Order*, 2 FCC Rcd at 1308-1309, para. 79.

[67] The Accounting and Audits Division of the Common Carrier Bureau has already implemented a similar requirement on a one-time basis for purposes of the 1990 independent audits. The 1988 and the 1989 independent audits involved a lesser standard. *See* note 51 *supra*.

[68] Given the differences in the carriers' operations and in their various nonregulated activities, we expect that certain differences in the manuals will remain.

[69] In general, the lower the threshold for materiality of errors and omissions, the closer and more costly the scrutiny required for the auditors to make the necessary certification.

[70] *See* paras. 12, 13 *supra*.

[71] We did not mandate exact technical equality so long as any technical variations were no greater than those for the basic services used by the BOCs. We did, however, reject proposals for interconnection that afforded only "rough comparability." *See Phase I Order*, 104 FCC 2d at 1036 n. 210, 1037, para. 150.

[72] *Id.* at 1036, para. 147.

[73] *Id.* at 1054-1055, para. 190. The Commission has approved 21 CEI plans and four market trial waivers. *Interim Waiver Order*, 5 FCC Rcd at 4715, para. 8.

[74] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), *pets. for rev. pending*, filed by Pacific Bell and Nevada Bell, BellSouth, NYNEX, U S West, and Southwestern Bell Telephone Company on August 6, 1990. In a companion order adopted today, we reinstitute our prior ONA requirements. *See* note 3 *supra*.

[75] *See Phase II Order*, 2 FCC Rcd at 3082, 3084, paras. 73, 89. In the *BOC ONA Order* and the *BOC ONA Amended Plans Order*, the Commission found that the BOCs had shown that their mechanized procedures and systems precluded quality-based discrimination. Accordingly, the Commission removed the quality reporting requirement for all the BOCs and, instead, required that the BOCs file annual affidavits attesting that they have not discriminated in the quality of services provided to ESP competitors. Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 248-249, para. 481 (*BOC ONA Order*); 5 FCC Rcd 3103, 3120, para. 145 (*BOC ONA Amended Plans Order*). *See also Phase II Reconsideration Order*, 3 FCC Rcd at 1160, paras. 76-77.

[76] *Phase II Order*, 2 FCC Rcd at 3093-3098, paras. 141-176.

[77] *California*, 905 F.2d at 1238.

[78] *Id.*

[79] Issues related to ONA and nonstructural safeguards for AT&T are addressed in a separate order adopted today unless otherwise indicated herein. *See* note 3 *supra*.

[80] *See Phase I Order*, 104 FCC 2d at 1076-1077, paras. 238-240; *Phase II Order*, 2 FCC Rcd at 3098-3099, paras. 177-186.

[81] The BOCs are permitted to provide certain enhanced services on an integrated basis pursuant to the interim waiver granted by the Bureau and extended here until the end of this proceeding. *See* para. 56 *infra*. That waiver conditions provision of these services on compliance with the *Computer III* CPNI rule.

[82] *Phase II Order*, 2 FCC Rcd at 3095, paras. 154-155. Multiline business customers annually receive notification of their CPNI rights. *Id.* at 3096, paras. 165-165.

[83] *BOC ONA Reconsideration Order*, 5 FCC Rcd at 3094, para. 83.

[84] As a consequence, we eliminate the requirement that the BOCs amend their ONA plans on April 15, 1991, to address competitive equity and informed customer choice issues in implementing the current CPNI requirements. *BOC ONA Amended Plans Order*, 5 FCC Rcd at 3121 (1990). We will incorporate our consideration of those issues within the review of the CPNI safeguard in this proceeding.

[85] *Computer II Further Reconsideration Order*, 88 FCC 2d at 541, para. 83 n. 34.

[86] *Id.* at 541-542, para. 85.

[87] *Phase I Order*, 104 FCC 2d at 1125, para. 343.

[88] *BOC Separation Order*, 95 FCC 2d at 1131, paras. 34-35.

[89] *Phase I Reconsideration Order*, 2 FCC Rcd at 3062, para. 188.

[90] *Phase I Order*, 104 FCC 2d at 1127-1128, paras. 347-348.

[91] *Phase II Order*, 2 FCC Rcd at 3102, para. 210.

[92] *California*, 905 F.2d at 1244.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1245.

[96] *Id.* The *California* Court also found fault with our preemption of state tariff regulation of intrastate enhanced services provided by communications common carriers. *See California*, 905 F.2d at 1239-1243, 1246. We do not consider that issue in this *Notice*.

[97] Computer III Remand Proceedings, CC Docket No. 90-368, FCC 90-415 (released December 17, 1990).

[98] *California*, 905 F.2d at 1243, quoting NARUC v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1989). *See also* Lousiana Public Service Commission v. FCC, 476 U.S. 355, 375 n. 4 (1986); North Carolina Utilities Commission v. FCC, 537 F.2d 787, 791 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); *Atlantic Richfield Co.*, 3 FCC Rcd 3089 (1988), *affirmed sub nom.* Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989).

[99] Section 1 of the Communications Act, 47 U.S.C. § 151.

[100] *Final Decision*, 77 FCC 2d at 432, paras. 124-126; *Reconsideration Order*, 84 FCC 2d at 91-96, paras. 120-133.

[101] Section 3(a) of the Act gives the Commission jurisdiction over interstate communications "between the points of origin and reception." 47 U.S.C. § 153(a). "[J]urisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination." *Southern Pacific Communications*, 61 FCC 2d 144, 146 (1976). "The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology." New York Telephone Company v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980). *See also* United States v. AT&T, 57 F.Supp. 451, 454 (S.D.N.Y. 1944), *affirmed sub nom.* Hotel Astor v. United States, 325 U.S. 837 (1945); Puerto Rico Telephone Company v. FCC, 553 F.2d 694, 699 (1st Cir. 1977); MCI Communications Corp. v. AT&T, 369 F. Supp 1004, 1029 (E.D. Pa. 1973).

[102] *See California*, 905 F.2d at 1244.

[103] ITCs were never subject to the *Computer III* network disclosure rules. All carriers, however, are subject to the network disclosure requirements of Section 68.110(a) and (b), or the Commission's Rules. 47 C.F.R. § 68.110(a) and (b). We do not address in this *Notice* preemption based on possible conflicts with the requirements of those rule sections.

[104] A carrier may introduce a new or modified service between six and twelve months after the make/buy point if it makes public disclosure at the make/buy point.

[105] This proposed preemption applies to state requirements for disclosure of the information encompassed within the federal network disclosure rules. If necessary, the Commission will address state requirements for disclosure of information different from that covered by the federal rule in the context of particular state actions.

[106] In *Computer III* the Commission did not apply, and we are not in this proceeding proposing to apply, CPNI restrictions to the integrated provision of interstate basic and enhanced services by the ITCs.

[107] *See Phase II Reconsideration Order*, 3 FCC Rcd at 1159-1160, paras. 66-71, 76-77; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase II, 4 FCC Rcd 2449, 2456-2457, paras. 56-62; *see also* note 75 *supra*.

[108] BOC Joint Contingency Petition for Interim Waiver of the Computer II Rules, filed July 3, 1990.

[109] *Interim Waiver Order*, 5 FCC Rcd at 4715, para. 10. In the *Interim Waiver Order*, the Bureau referred to both CEI plans and CEI waivers as CEI plans. We adopt that usage in this Order as well. *Id.* at 4716 n. 9.

[110] *Id.* at 4715, para. 10.

[111] As listed in Appendix B, thirteen parties filed comments and fifteen parties filed reply comments in this proceeding.

[112] Ameritech Comments at 3; Bell Atlantic Comments at 1; BellSouth Comments at 3-4; NYNEX Comments at 2-3; SWBT Comments at 4; U S West Comments at 1; USTA Comments at 1-2; Ameritech Reply at 2; and Boston Reply at 3-4.

[113] *See also* Letter from the Florida Messaging Coalition which opposes extending the waiver during the pendency of the remand proceeding.

[114] MCI Comments at 8-9; ATSI Comments at 5.

[115] MCI Comments at 13-16; MCI Reply at 2-8.

[116] ATSI Comments at 1, 4-13; MCI Comments at 24-49; Mid-Atlantic Comments at 1-3; and MCI Reply at 9-12.

[117] Bell Atlantic Comments at 4; SWBT Comments at 6; U S West Comments at 3-5; Ameritech Reply at 2; Bell Atlantic Reply at 3; BellSouth Reply at 13-14; NYNEX Reply at 4-5; and SWBT Reply at 5-6.

[118] *See* SWBT Comments at 7; U S West Comments at 3-5; and BellSouth Reply at 13-14.

[119] Bell Atlantic Comments at 4; BellSouth Comments at 4; Bell Atlantic Reply at 3; BellSouth Reply at 15-16; Boston Reply at 5; and SWBT Reply at 6.

[120] *See* Bell Atlantic Comments at 4; NYNEX Comments at 3; SWBT Comments at 4, 6; U S West Comments at 3-5; Ameritech Reply at 3-4; Bell Atlantic Reply at 3; BellSouth Reply at 15; Pacific Reply at 13-14; and SWBT Reply at 5, 9.

[121] Ameritech Comments at 3; U S West Comments at 5; Ameritech Reply at 2; BellSouth Reply at 15; Boston Reply at 3; NYNEX Reply at 5; Pacific Reply at 13-14, n. 38; and SWBT Reply at 5-6.

[122] *See* Bell Atlantic Comments at 5-6; BellSouth Comments at 5-6; SWBT Comments at 6; U S West Comments at 5; NYNEX Reply at 5-6, 9-11; and Pacific Reply at 10-12. The Bureau's Accounting and Audits Division has applied strengthened requirements to the BOCs' 1990 independent audits.

[123] To the extent that ATSI, MCI and Mid Atlantic wish to raise issues regarding the efficacy of our nonstructural and cost accounting safeguards for purposes of the choice of permanent safeguards rather than a limited, interim waiver, they will have another opportunity to file comments in this proceeding.

[124] The Courts have also stated that an interim measure following vacation should include sufficient provisions to safeguard against concerns identified by the Court on an interim basis, but should also avoid industry disruption. *See* Mid-Tex Electric Cooperative Inc., v. Federal Energy Regulatory Commission, 822 F.2d 1123 (D.C.Cir. 1987); American Gas Association v. Federal Energy Regulatory Commission, 888 F.2d 136 (D.C.Cir. 1989).

[125] Bell Atlantic Comments at 6-8; BellSouth Comments at 7-8; NYNEX Comments at 3-7; SWBT Comments at 8-11; USTA Comments at 2-4; Ameritech Reply at 7-9; BellSouth Reply at 17-23; Boston Reply at 6; and Pacific Reply at 18-22.

[126] U S West Comments at 10, n. 20.

[127] BellSouth Comments at 7 n. 7; U S West Comments at 10.

[128] U S West Comments at 11; Ameritech Reply at 9-10; BellSouth Reply at 20-21.

[129] U S West Comments at 7-8 n. 19; BellSouth Reply at 7, 21.

[130] ANPA Comments at 1, 3; CompuServe Comments at 1, 6-9; DC PSC Comments at 2-3; CompuServe Reply at 1-2; and DC PSC Reply at 2-3.

[131] *See* CompuServe Reply at 6-7; DC PSC Reply at 3; and MCI Reply at 12-14.

[132] *See* note 44 *supra*.

[133] *See* U S West Comments at 8-10.

[134] *See* U S West Comments at 10 n. 20.

[135] *See* CompuServe Reply at 7-8; MCI Reply at 15, n. 45. Of course, we understand that we cannot foreclose entirely the possibility that a BOC may justify a waiver of the *Computer II* requirement of structural separation on the basis of a public interest showing. *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C.Cir. 1969). We note, however, that any application for such a waiver faces a "high hurdle even at the starting gate," and that a petitioner "must plead with particularity the facts and circumstances which warrant such action." *Id.* at 1157 (quoting in part Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664 (D.C.Cir. 1968)).

[136] *See* para. 37 *supra*.

[137] *See* U S West Comments at 7-8, n. 19; BellSouth Reply at 20-21.

[138] *See* para. 37 *supra*.

[139] U S West Comments at 11-12.

[140] By granting this waiver, we do not attempt or intend to prevent any state from regulating the provision of wholly intrastate enhanced services by the BOCs. *See* California Comments. We do require, however, that the BOCs inform us of any specific state regulatory proposals or actions in this area. This waiver does not alter BOC obligations to comply with the restrictions set forth in the MFJ.

[141] 5 U.S.C. §§ 601-612. The BOCs and AT&T are dominant carriers under the Commission's Rules and are not small entities as defined by the Regulatory Flexibility Act. We have also concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. Thus, the parties directly subject to the proposals, do not fall within the Act's definition of a small entity. *Id.* § 601. *See* Third Report and Order, MTS And WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 338-339, paras. 358-362 (1983). Accordingly, this Commission is not required to apply the formal procedures set forth in the Regulatory Flexibility Act. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities.

[142] This action is taken pursuant to Sections 1, 4(i), 4 (j), 201-205, 218, 220, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 220, and 403.

CONCURRING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards

Coming into the debate on current common carrier issues like price caps, open network architecture and nonstructural safeguards has been, for me, something like climbing aboard a rapidly moving train.

I have no particular desire to stop the train. I have no illusions about my my ability to do so, even if that were my desire. I do think, however, that there may be some value in asking some serious questions as we hurtle forward: questions designed not to disrupt the trip, but rather to help us arrive, as safely and sensibly as possible, at the destination we desire.

I endorse this action to open a Rule Making to resolve an important question: What safeguards should we put in place to govern enhanced services provided by the Bell Operating Companies? I endorse our effort to resolve, as quickly as we can, the uncertainties created by the Ninth Circuit's decision vacating our *Computer III* orders. And certainly I want to do everything possible to hasten the day that enhanced services are widely available at fair, competitive prices.

I fear, however, that in our eagerness to bring about these worthwhile results, we may allow our enthusiasm to overwhelm our caution; that we may overstate our confidence about the safeguards in which we place our hope. The dangers of letting zeal rather than experience guide us--- of placing too much confidence, for example, in accounting safeguards that are new and relatively untested--- are twofold. First, we risk weakening, by overstatement, the very arguments on which we build our case. Second, we risk--- if we are guided by hope and credulity rather than cool prudence and hard experience--an even worse fate: to have been wrong, and to watch the enhanced services market and the public suffer the consequences.

I choose, therefore, to concur in the action that the Commission takes today--- not because I have any doubt that our goals are worthwhile, but because I wish to underscore some questions that need to be faced as we pursue those goals.

THE JOINT COST ALLOCATION RULES

Our joint cost rules are, as this item argues, now in place, and the carriers' cost allocation manuals have been generally approved. These rules, we hope, will greatly improve our ability to require carriers to separate the costs of providing nonregulated services from those of regulated services. Our affiliate transaction rules also should help prevent manipulation of prices for transactions between regulated and nonregulated affiliates. The Commission, moreover, has made clear its seriousness about compliance with its rules by its actions in recent enforcement proceedings.

Are these straws in the wind enough, given the vast magnitude of what we must audit--- billions in revenues and thousands of accounting transactions--- and given the reality of our severely limited auditing resources? The very size of the task could threaten the efficacy of our cost

allocation rules. Even under those rules, moreover, there is room for carrier discretion in allocating costs--- room, therefore, for some cost shifting. Requiring greater uniformity among manuals, as we propose in this notice today, will help. But under the Commission's proposal, the joint cost allocation process is our primary safeguard against cross subsidization. Is this membrane strong enough to bear the weight that is soon to press against it?

PRICE CAP REGULATION

Price cap regulation for the Bell Operating Companies will indeed change the incentives these companies face. Our hope and belief is that price caps will reduce carriers' incentives to shift nonregulated costs to regulated operations, because carriers will no longer be able to obtain an automatic rate increase to cover the shifted costs. But price caps are unlikely, in my judgment, to remove totally the threat of cost-shifting. For example, even under price caps a carrier might have the incentive to shift unregulated costs to regulated operations, because by doing so it could reduce its obligation to share with ratepayers any earnings above the no-sharing zone. Or, if we set our productivity factor too low, a company operating under price caps could use its extra earnings to subsidize its enhanced services operations.

IMPLEMENTATION OF ONA

Open Network Architecture, like price caps, holds out great hope. But hope and confidence are not precisely the same thing. ONA is still more a concept than a reality. It is, to be sure, the regulatory equivalent of the Modified Final Judgment's equal access requirement, which has been crucial in promoting competition in the interexchange market. Will ONA perform the same function for the enhanced services market--- preventing BOC control over bottleneck facilities from giving the BOCs an unfair competitive advantage? I hope so; I hope that ONA will prove as successful as the MFJ's equal access requirement. But it seems to me that the absence of a genuine track record on ONA calls for greater modesty and diffidence on the Commission's part at this stage. Hope is surely warranted; certainty can be gained only with experience.

Isn't it possible, for example, that the pricing flexibility afforded to the BOCs under price caps will threaten to subvert the effectiveness of ONA as a safeguard against discrimination? Although ONA services, at least for now, are outside the price cap scheme, cost-based pricing for ONA services may be difficult to achieve once we have moved away from cost-based tariff review of the other basic services that are subject to price caps. Will it still be possible, after price caps, for the Commission to deter and detect discrimination in the prices that BOCs charge for ONA services that competing providers of enhanced services depend upon? We simply don't know--- and in the absence of greater knowledge, claiming too much certainty will weaken, rather than strengthen, our argument for moving irretrievably away from all structural separation.

ALTERNATE APPROACHES?

Despite our uncertainty about these questions, the notice we adopt today treats the issue with confidence bordering upon insouciance, and poses a stark, either/or choice: nonstructural safeguards versus *Computer II* -type structural separation. Perhaps there is no realistic middle ground between these two polar options. But elementary prudence, and an eagerness to be guided by experience rather than hope, suggest to me that the Commission should be calling for comment on alternate approaches, such as stricter nonstructural safeguards or modified forms of structural separation. Isn't it also conceivable that structural separation might be appropriate in some cases, though not all? The practical difficulties of deciding between such cases would, no doubt, be great. We need to be open to the possibility, nevertheless, that while the benefits of integration may be great for services such as protocol processing or perhaps voice messaging, structural separation might be appropriate in other situations.

MERGERS AND ACQUISITIONS

Whether or not we conclude that substituting nonstructural safeguards for structural separation is in the public interest, we may be faced with a somewhat different question if the BOCs begin to acquire large enhanced services competitors on the same scale that they have acquired out-of-region cellular telephone companies.[1] Would the benefits of integration still outweigh the risks to ratepayers and competitors in the enhanced services market? I would like to see comments on this question, and on whether the Commission should develop standards for reviewing such acquisitions.

AN OPEN MIND

Even as I raise these questions, I want to emphasize that I am fully prepared to approve substituting nonstructural for structural safeguards if the record demonstrates that the benefits of integration (which are undoubtedly substantial) do indeed outweigh the risks of lifting structural separation. I hope that the record developed in this proceeding will present convincing evidence on the efficiencies of joint operations. I would find particularly persuasive any evidence that particular services will be withheld unless the BOCs are allowed to offer them on an integrated basis. Evidence that services can be more efficiently provided through physical integration of network facilities--- for example, through switch software modifications--- will also carry weight.

My goal in this proceeding is that the Commission conduct its balancing of costs and benefits with its eyes open, not filled with stars. Potential safeguards, after all, do not necessarily constitute real safeguards; mere hopes of public benefits do not necessarily constitute actual benefits. As the possibility of widespread BOC participation in the enhanced services industry increases, it is crucial that our safeguards be effective--- both in permitting BOC entry and in guarding against anticompetitive activity.

FOOTNOTE FOR STATEMENT

[1] I assume the near-term removal or further relaxation of the information services restriction contained in the MFJ.

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 90-424
38094

In Re Application of	)	
	)	
WWOR-TV, Inc.	)	BTCCT-901127KE
	)	
For Transfer of Control of	)	
Station WWOR-TV, Channel 9	)	
Secaucus, New Jersey	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990 Released: December 26, 1990

By Commission:

1. The application set out in the caption seeks our approval to transfer control of station WWOR-TV (channel 9, Ind.), Secaucus, New Jersey, from its ultimate parent, MCA, Inc. (MCA), directly to its shareholders. Garden State Broadcasting Limited Partnership (Garden State), Whitely Communications (Whitely) and Michael Krauss (Krauss) oppose the grant of the application, by pleadings filed November 29, December 13 and December 17, 1990, respectively. We consider here the application, the oppositions, and related pleadings. [1]

Background

2. WWOR-TV, Inc., is a wholly owned subsidiary of MCA Broadcasting, Inc., which in turn is wholly owned by MCA. MCA's Board has approved a tender offer for all of its shares from a subsidiary of Matsushita Electrical Industrial Company, Ltd. (Matsushita), a firm organized under the laws of Japan. MCA

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[1] The related pleadings are: an Opposition to Garden State's pleading filed by MCA on December 5, 1990; Garden State's Reply of December 11, 1990; and MCA's Opposition to Krauss' Objection filed December 19, 1990. MCA elected not to respond to Whitely's pleading. Whitely, however, subsequently filed a Petition for Stay of the transfer on December 13, 1990, a Petition to Revoke the WWOR-TV license on December 14, 1990, and a further letter on December 19, 1990. MCA responded to the revocation petition on December 19, 1990. Krauss filed a reply on December 20, 1990, to which MCA responded by letter of the same date.

shareholders will receive $66 per share, if they decide to tender their stock. The tender offer provides, however, that Matsushita will not acquire MCA's broadcast assets. Instead, if more than 50 percent of the MCA stock is tendered, MCA proposes to transfer its shares in MCA Broadcasting to a newly created company, Newco, Inc. The shares of Newco will then be distributed to MCA's existing shareholders on a proportional basis before Matsushita purchases the MCA shares. Specifically, MCA shareholders will receive one share of Newco for every five shares of MCA they tender. Matsushita is not a party to the distribution agreement. MCA will survive the tender offer, minus the broadcast assets, but as a wholly owned subsidiary of Matsushita.

3. In 1987, Garden State and Whitely filed timely competing applications for construction permits for a new television station to operate on channel 9, Secaucus, which were mutually exclusive with the application for renewal of station WWOR-TV's license.[2] A comparative hearing is pending, although WWOR-TV, Inc., and Garden State have filed a settlement agreement. One point should be clear. We shall act on the transfer application before us. MCA will then be obligated by section 1.65 of the Rules to amend its renewal application to report this action to the Administrative Law Judge presiding over the comparative hearing. The effect, if any, on the comparative hearing or the settlement agreement is for him to decide in the first instance. Our action here does not prejudice any decision he may make.

4. This case raises two broad questions.[3] First, Garden State and Whitely

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[2] The presiding Administrative Law Judge later dismissed Whitely's application. WWOR-TV, Inc., FCC 89M-2206, released Sept. 6, 1989, aff'd, 4 F.C.C. Rcd. 8127 (Rev. Bd. 1989), aff'd, 5 F.C.C. Rcd. 3768 (1990), reconsideration denied, FCC 90-369, released Nov. 16, 1990. Whitely has filed a Notice of Appeal with The United States Court of Appeals for The District of Columbia Circuit.

[3] Krauss raises a third issue that can be addressed briefly. Krauss filed a law suit in the federal courts in which, among other things, he asserts that WWOR-TV, Inc., engaged in coercive reciprocal trade practices in violation of the antitrust laws. WWOR-TV, Inc., denies wrongdoing and has also filed a counterclaim against Krauss. Krauss contends that the matters under consideration in that pending case are similar to the reciprocal trade practices considered by the Commission in RKO General, Inc., 78 F.C.C.2d 1 (1980), rev'd on other ground, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). Although we did consider reciprocal trade practices in RKO, we issued our decision in that case before our ruling in Character Qualifications, 102 F.C.C.2d 1179 (1976), on recon denied, F.C.C. Rcd. 421 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. F.C.C., No. 86-1179 (D.C. Cir. June 11, 1987). There, we changed our policies with regard to pending court cases, including those dealing with antitrust or anticompetitive matters. We stated that "we do not believe it appropriate or necessary to engage in the initial investigation or enforcement of the antitrust laws." Id. at 1202. Henceforth, we concluded, "consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade

observe that the application used is FCC Form 316, commonly referred to as the short form. Unlike long-form transactions (FCC Forms 314 and 315), transfers eligible to use the short form are not subject to a statutory 30-day waiting period or to formal petitions to deny. Garden State and Whitely assert that the transaction before us is not eligible for short-form processing. Second, all three objectors contend for a variety of reasons that MCA has not shown that, if the tender offer is successful, Newco will comply with section 310(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 310(b), concerning alien ownership control of, or influence over, United States broadcast stations. We turn to those questions now.

Use of the Short Form

5. The challenges to the use of the short form do not require extended discussion. Section 309(c)(2)(B) of the Act permits the use of summary procedures in assignment or transfer cases that do not involve a "substantial change in ownership or control." Section 73.3540(f) provides examples [4] of transactions that qualify under the statute. Subsection 73.3540(f)(5) specifically permits short-form procedures "where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests...." There is no apparent reason why the rationale underlying that rule would not also apply to transfers of control, as well as to assignments. We consider that subsection, therefore, to establish the proposition that the use of the short form is generally appropriate in the circumstances presented here. [5]

Commission, or other governmental unit charged with the responsibility of policing such activity." Id., footnote omitted. There has been no such adjudication in this case, no violations have yet been found, and thus the foundation is missing for Krauss' assertion that violations might continue under Newco's stewardship. Further, we also believe that our action here should lessen Krauss' concern for the potential for anticompetitive practices that it believes flow from commonly owned television stations and programming production companies. MCA now owns WWOR-TV, Inc., and, if the tender offer is successful, MCA will become only one program supplier to the station and must compete with other such suppliers. Finally, there is no indication as to how maintenance of the status quo would provide Krauss with any relief relating to its litigation. Accordingly, there is no reason to condition our grant on the outcome of the court proceeding, as requested by Krauss.

[4] The rule only illustrates the kinds of transactions that qualify for short-form procedures. The fact that a particular transaction might differ from those examples is not dispositive. The touchstone is the statutory requirement that the transaction constitutes an insubstantial change in ownership or control. See Storer Communications, Inc., 101 F.C.C.2d 434, 444, aff'd, 763 F.2d 436 (D.C. Cir. 1985).

[5] We also note that subsection 73.3540(f)(4) permits the use of short-form procedures for corporate reorganizations. We believe that the proposal before us also qualifies as a corporate reorganization.

6. Garden State raises specific challenges to the use of the short form in this case. In support of its use of the short form, MCA referred to an earlier action in which the staff approved the spin-off on a short form of the broadcast stations owned by LIN Broadcasting Corporation, in which LIN used essentially the same procedure that MCA proposes here. Garden State contends that the LIN case does not govern here because, in LIN, there was a continuity in the membership of the Board of Directors of the new company. Here, in contrast, Garden State alleges that only one of Newco's proposed Directors was reported in the 1987 application pursuant to which MCA acquired station WWOR-TV (then WOR-TV). Under the Commission's decision in the Storer proceeding, cited above, the entire Board of Directors can be changed at one time if our approval is obtained in advance on a short form. Accordingly, the use of the short form would be permissible if, as alleged, only one Director were carried over to Newco. [6] Garden State seeks to distinguish Storer on the ground that the case involved a proxy contest and that the shareholders of the company had an opportunity to approve the transaction. Here, Garden State argues, only the Directors have approved the tender offer, not the shareholders. Garden State overlooks the fact that under the securities laws the shareholders have been provided with substantial information about the tender offer, including the spin-off of station WWOR-TV. If they tender their shares, they will be approving the transaction, including the creation of Newco.[7] Moreover, all shareholders are entitled to the tender price, including those who do not initially tender their shares. Contrary to Garden State's assertion, therefore, those who do not initially tender their shares do not do so at the risk of economic loss.[8] Accordingly, we conclude that the shareholders have

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[6] Gradual changes in the composition of the Board of Directors are reported in the annual Ownership Reports submitted by all licenses. Four of the proposed Directors of Newco were previously reported in MCA's 1987 renewal application and more recently in its January, 1990 Ownership Report.

[7] We take official notice of the material filed with the Securities and Exchange Commission (SEC) regarding the tender offer. MCA is incorporated in Delaware. According to the Schedule 14(d)-1 submitted to the SEC, if less than 90 percent of the MCA shares are tendered, shareholders will be asked to vote on the overall transaction (including the spin-off of WWOR-TV), under the Delaware General Corporation Law.

[8] Whitely correctly observes that as a result of the five-to-one MCA/Newco stock distribution ratio, the tender offer provides that shareholders whose interests are not evenly divisible by five will receive cash for their "odd" shares. Further, those whose total holdings are less than five MCA shares, such as Whitely, will receive cash, but no Newco stock. Thus, Whitely notes Newco shareholders will not be identical to MCA's existing shareholders. Section 73.3540(f)(5), however, refers to transfers not involving a "substantial change" in the interests of shareholders. The minute changes noted by Whitely are not decisionally significant. In addition, we do not believe that the conversion rights discussed below in paragraph 10, even if all

the opportunity to approve or disapprove the transaction by tendering or not tendering their shares.

7. MCA's shareholders hold ultimate control of the corporation, although they have delegated authority with regard to many matters to its Board, as would be expected with a widely held, publicly traded company. Newco's shareholders will be substantially the same as those of MCA. The licensee's representations to us (for example, its EEO program) remain unchanged and the licensee remains accountable for its representations. Garden State and Whitely have failed to allege any facts to establish that MCA differs in any decisionally significant way from the corporate organization considered by the Commission in the Storer case, which also involved a widely held, publicly traded company. [9] Accordingly, as in Storer, we believe that the transaction described above does not involve a "substantial change in ownership or control," within the meaning of section 309(c)(2)(B) of the Act. Approval of the transaction on short form and the use of summary procedures are therefore permitted. [10] Because we find this transaction consistent with the Act, we do not believe that we should defer action based on Krauss' speculation that additional parties might file pleadings.

Alleged Impermissible Alien Ownership or Influence

8. Compliance with the 25-percent Alien Ownership Guideline. In its pending renewal application, MCA reported that it had conducted a thorough survey of its stockholders in 1986 and determined that aliens owned 8.76 percent of its stock. It further represented that an update of the 1986 survey was underway to assure continued compliance with section 310(b). Garden State, however,

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were exercised, would remove the proposed transaction from the provisions of subsection 73.3540(f)(5) of the Rules. The percentages involved are still relatively small (less than 16 percent), and only Mr. Geffen's interest after conversion appears to be attributable.

[9] Garden State appears to suggest that MCA needs to establish affirmatively that it is a typically organized corporation to justify its use of a short form. We reject that suggestion as being burdensome and without apparent benefit.

[10] Under the Act, formal petitions to deny do not lie against applications that qualify for short-form procedures. Consequently, Garden State's and Whitely's pleadings must be dismissed. In our discretion, however, and in view of the public interest questions raised, we shall consider those pleadings as informal objections, along with Krauss' objection, pursuant to section 73.3587 of the Commission's Rules. Because Garden State and Whitely seek to dismiss or deny the application, however, we review their pleadings to determine whether it has alleged properly supported specific facts that, if true, would establish a substantial and material question of fact that a grant of the application would be inconsistent with the public interest.

asserts that the widely publicized Matsushita sale "has likely resulted in substantial stock activity that clearly requires that a current survey be taken ...." Emphasis added. A statement that certain matters are "likely" clearly does not constitute a specific allegation of fact. It also appears to us, in the absence of information to the contrary, that whatever activity in the stock that has occurred could just as likely be expected to track the percentage of alien ownership already extant.

9. In the typical case, Garden State's failure to allege specific facts would be dispositive. Nevertheless, we are concerned about compliance with section 310(b), and a few additional words are in order. A licensee's obligation to comply with section 310(b) is continuous, but we have never imposed on publicly traded corporate licensees the costly requirement of conducting on-going surveys to assure compliance with the statute. That would be especially burdensome where, as here, the last survey showed alien-ownership levels far below the applicable 25-percent guideline. In its pleading, MCA disclaims any knowledge of any evidence to suggest any significant increase in alien ownership. In the normal course of events, MCA would not be required to recertify compliance with section 310(b) until it filed its next renewal application in 1992. In the absence of a well-founded question as to compliance with the Act, we would not require submission of the results of an alien-ownership survey with a pro forma application for transfer of control. Moreover, the most likely purchaser of a large block of MCA stock in recent years would be Matsushita. Nevertheless, the Schedule 14D-1 submitted to the SEC states that that Matsushita, its subsidiaries, officers, directors and associates do not beneficially own or have the right to acquire any MCA equities other than through the tender offer. [11]

10. Whitely notes that it raised the question of a possible violation of section 310(b) in the pending comparative hearing for channel 9, Secaucus. Whitely's motion, which encompassed a wide variety of matters, was dismissed by the presiding Administrative Law Judge as repetitive or speculative. WWOR-TV, Inc., FCC 89M-2225, released September 7, 1989. Whitely returns to that issue here, and observes that MCA issued two series of subordinated debentures, one convertible to MCA common stock at $69.625 each (the series was sold for a total of $300 million), and the other convertible at $76.625 each (the series was sold for total of $200 million). All the debentures were sold overseas. The degree of alien ownership would increase if, as Whitely surmises, all the debentures are converted to MCA common stock. When the debentures were issued, MCA set aside 6,918,911 common shares to issue if all debenture owners elected to convert. Assuming that all such stock is owned by aliens and that all

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[11] At the time MCA and Matsushita executed the merger agreement, MCA also granted Matsushita an option to buy about 18 percent of its shares, triggered by the MCA Board changing its mind as to the sale or the appearance of another bidder for MCA. Options are not counted until exercised, the triggering events have not occurred, and, in any event, the option agreement specifies that the option is not exercisable to the extent that it might place MCA in violation of the Communications Act. Thus, the option is not of concern. See, e.g., Data Transmission Co., 52 F.C.C.2d 439 (1975).

debentures will be converted before the tender offer is closed, the percentage of MCA's stock held by aliens would increase by about 7.73 percent.[12] MCA, however, notes that only common stockholders are eligible for Newco shares, and that the holders of the debentures have economic incentives not to convert their holdings to common stock. In the case of the $300 million issue, MCA states that an antidilution upward adjustment will be made in the conversion rate as a result of the spin-off, providing an incentive to hold the debentures at least until after the spin-off. In the case of the $200 million issue, the incentive flows from the right to put the shares at a specified price. In MCA's view, "given the profile of this type of investor, taking advantage of a certain pricing advantage is highly predictable behavior." In sum, MCA takes the position that there would be no appreciable change in alien ownership due to the existence of the convertible debentures.

11. Whitely also states that MCA undertook to acquire a Canadian corporation, with the purchase "funded in part by MCA common stock." Whitely does not identify the Canadian company, nor does it indicate what portion of the purchase was paid in stock. Such nebulous statements are not specific allegations of fact. Nevertheless, the only recent purchase of which we are aware is MCA's acquisition of GRP Records, Inc., with MCA stock reportedly worth about $40 million. MCA announced that transaction on February 28, 1990. At then-current stock prices, $40 million would amount to less than about 750,000 MCA shares, or less than about 0.86 percent of the total shares outstanding.

12. Assuming the facts most favorable to Whitely, therefore, we add the figure from MCA's last survey, 8.76 percent, plus the worst possible case (7.73 percent) based on maximum debenture conversion, plus about 0.86 percent for the unidentified Canadian company, which totals about 17.35 percent alien ownership, well under the 25-percent guideline. In sum, there is no known basis for concluding that there is a substantial and material question of fact that MCA now violates the 25-percent guidelines specified in section 310(b), or that Newco will violate that provision.

13. Alleged Impermissible Alien Control or Influence. Some prefatory observations are appropriate to place the contentions in context. We note that, while section 310(b) of the Act does not permit alien control of United States broadcast stations, a limited degree of influence is permissible. That

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[12] The percentages indicated are based on the total number of MCA shares, as set out in the Schedule 14(d)-1, that would be relevant in evaluating Whitely's hypotheses. MCA has issued 75,315,794 common shares. All of its Series B Preferred Convertible Stock is owned by Mr. David Geffen, a principal of an MCA subsidiary. Mr. Geffen has agreed to convert and tender 80 percent of those shares, which will result in the issuance of 7,316,598 additional MCA shares. Further, conversion of all of the debentures, as conjectured by Whitely, would result in the issuance of 6,918,911 more MCA shares. Finally, an antidilution provision in the debentures could result in issuing up to 700,000 additional MCA common shares. Thus, making Whitely's assumptions, there would be a total of 89,551,303 common shares outstanding on a diluted basis.

conclusion is implicit in the statutory provisions that permit aliens to hold up to 25 percent of the stock of the parent of a licensee and to hold up to 25 percent of the seats on its Board of Directors. Thus, an argument that aliens might have a limited degree of influence over the parent of a licensee is not by itself dispositive. Rather, the questions under the statute are: whether aliens are in de facto or de jure control of a broadcaster; whether the interests held by aliens or representatives of aliens are within the statutory guidelines; and whether the degree of influence of an alien or alien company exceeds that which would ordinarily be associated with a party that nominally falls within those guidelines.

14. We also note that, in the context of a corporate spin-off, this is not the first time that we have confronted allegations that the new company would still be impermissibly controlled by its former owners. In Columbia Pictures Industries, Inc., 30 F.C.C.2d 9 (1971), for example, we approved the spin-off of the program syndication business and the cable television systems owned by CBS to a newly created company, Viacom International, Inc. (Viacom). Most of Viacom's officers and employees would perform the same roles they had performed for CBS. A majority of the Viacom Board (six of nine) had not been previously associated with CBS. Moreover, there was a continuing business relationship between Viacom and CBS with regard to syndicated programming. Despite those past and continuing relationships, the Commission concluded that Viacom would constitute a separately controlled company for the purposes of section 76.501 (then section 74.1131) of the Rules (which prohibits common ownership of cable television systems by major broadcast television networks) and section 73.658(j) (which places limits on the syndication of television programs by television networks). [13]

15. Also relevant here is our action in Spanish International Communications Corp., 2 F.C.C. Rcd. 3962 (1987), aff'd, 3 F.C.C. Rcd. 4319 (1989), remanded sub nom. Coalition for the Preservation of Hispanic Broadcasting v. FCC, 893 F.2d 1349 (D.C. Cir. 1990), motion for reh'g en banc granted March 27, 1990. There, an Administrative Law Judge had ruled that Spanish International Communications Corp. (Spanish International), a United States corporation, was under the control of Spanish International Television Network, a foreign company, or the principals of that network. The Commission approved a settlement in which Spanish International agreed to sell its stations, and the Commission later approved a sale to a subsidiary of Hallmark Cards, Inc. Hallmark agreed to retain the station managers and the affiliation with the foreign network for two years. The staff and the Commission on review rejected a petitioner's claim that the stations would continue to be under an unlawful alien influence because of those relationships. The Commission observed that the petitioners had failed to present any supported factual allegations to

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[13] In that decision, we required CBS principals to divest over time their stock in Viacom. In this case, all voting stock will be acquired by Matsushita, so MCA officials will be divested of that interest. Three current MCA principals will acquire nonvoting, preferred stock in MCA's immediate parent, however. No reason is alleged or apparent for requiring the divestiture of such nonvoting stock in this case.

negate the buyer's assertion that it would be in control. The Commission concluded that the absence of such facts was fatal to the petitioner's position. Id., 3 F.C.C. Rcd. at 4321. [14]

16. For the purposes of our discussion here, these cases can be said to stand for two propositions. First, when a company is spun off, Commission requirements can still be met upon a review of all relevant facts, despite "carryover" employees, common directors and even on-going business relationships. Second, petitioners that wish to challenge such spin-offs as inconsistent with our requirements must allege specific facts to establish a substantial and material question as to whether the required degree of segregation would not be established or that the parties would not reasonably be expected to conduct themselves as represented. Speculation is not enough. With that backdrop, we turn to the questions presented.

17. Garden State and Krauss contend that because of continuing relationships after the tender offer between Newco and a foreign-owned MCA, careful review is required. Otherwise, in Garden State's opinion, "a situation could arise such as that in Spanish International Communications Corp., 2 F.C.C. Rcd. 3336 (1987)...." In that case, as noted previously, the presiding Administrative Law Judge had found a violation of section 310(b) of the Act. [15] While we certainly support the position that we carefully review matters before us, we must observe that it is at least theoretically possible (but fortunately rare) that any applicant might not abide by its representations to us or not comply with Commission requirements in the future. It does not follow, however, from the fact that one licensee might violate a law or rule that all other subsequent applicants would similarly disregard our requirements. We have previously stated with regard to petitioners alleging possible prospective violations that "in the absence of information to the contrary," the Commission would not assume that an applicant "will not faithfully carry our its representations or that [the applicant] will be operated or controlled in a manner that differs from the [sales] agreement under consideration." News International, PLC, 97 F.C.C.2d 349, 356 (1984). In this case, as well, we do not infer improper future conduct, "in the absence of information to the contrary."

18. We must address, therefore, the nature of Newco's corporate organization and the continuing relationships between Newco and MCA after the tender offer. Garden State and Whitely note the composition of Newco's Board, whose eight members are all United States citizens. Of these, the applicants propose two

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[14] The court later remanded the case to us for further proceedings, but only with respect to the application of the Jefferson Radio policy. 893 F.2d at 1362. It did not disturb our conclusions with regard to alien control.

[15] Among other things, the facts in Spanish International disclosed long-term family relationships between aliens and the Chief Executive Officer of the U.S. licensee, and considerable financial dependence by the licensee's principals on those aliens. Those facts are completely absent in this case.

members who will remain associated with MCA, [16] two who will be former MCA officers, but who will sever all ties with MCA, [17] and four who will be jointly nominated by MCA (before its acquisition by Matsushita) and Newco principals, but who have not been Officers, Directors or employees of MCA.[18] Thus, negative control of the Board will be in the hands of those who have not been Officers, Directors or employees of MCA, and six of the eight Directors will have no connection with MCA after the proposed tender offer. Applying here what we stated in the Viacom spin-off case, the Directors of Newco "should have every incentive, as well as the clear fiduciary duty", to serve Newco's interests. Columbia Pictures Industries, Inc., 30 F.C.C.2d at 16. That conclusion "applies to those officers and directors of [Newco] with previous [MCA] affiliation as well as to those lacking any such affiliation." Id. [19] Further, the applicants state that Newco and MCA will have no common employees.

19. There is nothing in the record with regard to the post-transaction positions of three other MCA officials. Richard Baker, Vice President and Controller of MCA, also serves now as the Chief Financial Officer and Director of MCA Broadcasting, and as Treasurer and Director of WWOR-TV, Inc. Further, George Smith is an MCA Vice President, and also serves as a Vice President and Director of both MCA Broadcasting and WWOR-TV, Inc. Finally, Michael Samuel is a Vice President and Secretary of MCA. He also serves as Vice President and Director of MCA Broadcasting, and Secretary of WWOR-TV, Inc. MCA may have intended these individuals to fall under its representation that Newco and MCA would have no common employees. We do not ordinarily consider directors to be employees, however, and believe there should be no uncertainty on this point. In order to limit the degree of influence of MCA in Newco and to assure arm's-length transactions between the two companies, we believe that these three individuals should sever their relationships with either MCA, or with MCA

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[16] These are Thomas Wertheimer, who is Executive Vice President and a Director of MCA and Robert D. Hadl, an MCA Vice President and General Counsel.

[17] These are Lawrence Fraiberg and Michael Alexander. Fraiberg is now President of both MCA Broadcasting and WWOR-TV, Inc. Alexander is Executive Vice President of MCA Broadcasting and WWOR-TV, Inc., and the station's General Manager. They will be responsible for the day-to-day operation of the station under Newco's stewardship.

[18] One of these four, however, has served as communications counsel for MCA in the past.

[19] Garden State finds questionable MCA's role in nominating the proposed Newco Board. As a practical matter, we do not see how it could not have a role, because it is creating Newco as a means to eliminating the alien ownership problem. That same factor was an element in Columbia Pictures Industries. We did not find that factor inconsistent with separation there, and we see no need to reach a different conclusion here.

Broadcasting and WWOR-TV, Inc. Requiring immediate replacement, however, could be unduly disruptive. Accordingly, we believe it appropriate to condition our grant on their removal within 90 days after the proposed transaction is closed. Accordingly, subject to that condition, and applying the rationale of our analogous decisions involving the CBS-Viacom and Spanish International-Hallmark transactions, discussed above in paragraphs 14 and 15, [20] we are satisfied that the corporate organization of Newco will permit it to operate independently from MCA.

20. Garden State and Krauss refer to section 5.03 of the stock distribution agreement, which permits Newco and MCA to continue existing contracts for the provision of products and services or to enter into new such contracts. MCA responds that the station has continuing programming relationships with many program suppliers, including MCA, and that in order to compete in the market it must rely on a variety of sources. It states further that after the spin-off, Newco will have to negotiate at arm's length with MCA, as it will with any other program supplier. In the circumstances presented here, we see no benefit in requiring Newco to abrogate existing contracts with MCA, which is one of several program syndicators providing programming to the station, or in banning Newco from a source of programming available to every other television licensee. As long as future negotiations are at arm's length, no injury to the public results. Because Garden State and Krauss have presented nothing but speculation on this point, we conclude there is no basis for questioning the

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[20] When compared to the case before us, there are some differences in the contexts in which we reviewed the Columbia Pictures and Spanish International cases. In Columbia Pictures, the Commission discussed whether a proposed corporate structure would comply with newly enacted prohibitions on common ownership or control of, or holding attributable interests in, specified media activities; for example, national television networks and cable television systems. Attributable interests in corporate licensees are now generally defined as officers, directors and, generally, five-percent or greater shareholders. Attributable of Ownership Interests, 97 F.C.C.2d. 997 (1984), reconsidered in part, 58 R.R.2d 604 (1985), further reconsidered, 1 F.C.C. Rcd. 802 (1986). In the case before us, there is no ban on common ownership of companies producing television programming and operating television stations, as attested by MCA's existing ownership of program production companies and a television licensee. The limit on ownership and influence in this case is defined only by section 310(b), which would permit up to 25-percent alien ownership of Newco's stock and up to 25 percent of its Directors to be alien individuals. Thus, the degree of influence that would be permissible is greater in the case of before us than in Columbia Pictures. (As noted, all Newco Directors are United States citizens and the degree of alien ownership falls considerably under the 25-percent guideline.) Finally, we are not dealing here with a case such as Spanish International Communications Corp., 2 F.C.C. Rcd. 2336 (1987), where we assumed for the purposes of the ruling the existence of a violation of section 310(b). Requiring complete ownership divestiture is entirely appropriate to remedy an existing violation in order to expunge any sources of corporate tolerance for wrongdoing. No such violation exists in the case before us.

provisions of section 5.03 of the agreement.

21. Garden State also points to a variety of other provisions that indicate, at least at the outset, relationships between Newco and MCA. These include a trademark license agreement to permit Newco to continue use of the "Universal 9" trademark, leases of office space and a limited duration interim service agreement. There is nothing in the record, however, to dispute MCA's characterization of these provisions as "arm's-length administrative arrangements necessary in connection with the divestment of a major broadcast asset" that permit continued operation of an on-going concern. For example, the licensee now leases office space from its parent. There is no apparent reason why Newco should be forced to find new space immediately. The agreement does not dictate that those relationships continue, and Newco is free to engage in arm's-length negotiations with MCA or others in the future. An immediate severance of such relationships would be highly disruptive and contrary to the public interest. Garden State also refers to a "poison pill" plan to be adopted by Newco. Such plans are commonplace. We do not understand how it would prevent the election of new Directors in the normal course of events, nor why Newco should be barred from adopting a "poison pill" generally. Certainly, Garden State has failed to provide any indication as to why a poison pill plan would "entrench" Newco's management in a manner that differs from any other company. To the extent that entrenchment is a concern, however, we note that six of the eight Newco Directors will not have any connection with MCA. With the initial Board of Newco so constituted, we fail to see how the plan would serve to perpetuate MCA's alleged control of Newco. With regard to finances, Newco intends to acquire a line of credit from an independent financial institution to provide initial working capital. If that line of credit is not promptly available by the time of closing, however, MCA has agreed to provide working capital for up to 90 days. A loan for such a limited time to provide the necessary bridge capital does not constitute control or undue influence, and in fact aids in a smooth transition to independence. [21] Because we have determined that the Newco Board, as constituted, is sufficiently separated from MCA to permit arm's-length transactions, no action on these matters is warranted.

22. We have reviewed the application and the pleadings in this case carefully. We believe that Newco will be controlled as indicated in the application. Garden State, Whitely and Krauss have failed to submit properly supported facts making a prima facie case that, after the proposed tender offer, MCA would be able to dominate the management of Newco or its subsidiaries, or control its programming, personnel practices or finances. Nor does it appear that MCA will be able to nominate or elect any Newco Board members after the proposed tender

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[21] Garden State also asserts that the Commission should know what Newco stockholders will have continuing relationships with MCA. Our concern however, focuses on attributable interests. Only Mr. Wasserman, MCA's current Chief Executive Officer, will have an attributable ownership interest in Newco (about seven percent), but will not be an Officer, Director or employee of Newco or its subsidiaries. It is not apparent, therefore, how Newco would be "effectively controlled" by MCA stockholders, as speculated by Garden State.

offer. Thus, there is no basis for concluding that there is a prima facie case that Newco would be under the de facto control of MCA. Benjamin L. Dubb, 16 F.C.C. 274, 289 (1951); Stereo Broadcasters, Inc., 87 F.C.C.2d 87 93 (1981); William S. Paley, 1 F.C.C. Rcd. 1025 (1986), reconsideration denied, 2 F.C.C. Rcd. 2274 (1987), aff'd per curiam sub nom. Fairness in Media v. FCC, 851 F.2d 1500 (D.C. Cir. 1988). Further, our review of the application and the factors discussed above, individually and cumulatively, does not disclose a substantial and material question of fact suggesting an impermissible degree of alien influence over the operation of Newco and its subsidiaries.[22]

Motion for Stay

23. Whitely's Motion for Stay requires little discussion. Its arguments on the merits have been discussed above and found wanting. The likelihood of success on the merits of an appeal has thus not been established. Whitely's alleged irreparable injury is premised on the possibility that the court would reverse the decisions of the Administrative Law Judge, the Review Board and the Commission and order Whitely's reinstatement as a party to the Secaucus comparative hearing. In that event, Whitely claims that a grant of the transfer application would deny it "the opportunity of securing channel 9 as it will be transferred to other parties." This is a non sequitur and wrong. Our action here does not terminate the comparative hearing or extinguish whatever rights Whitely might still retain. Whitely asserts that a grant of the stay would not injure any other parties. In our view, however, a stay would injure the applicants and MCA's shareholders, because they would not be able to consider a legal tender offer and receive any benefits that might flow from it. Finally, there is a public benefit in expeditious Commission processes, and in permitting the operation of other laws regulating the activities of corporations. Thus, Whitely has failed to establish all four of the elements needed to support the extraordinary relief of a stay. See e.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); MMM Holding, Inc, 4 F.C.C. Rcd. 8243, 8249 (1989). Whitely's Motion for Stay, therefore, will be denied.

Petition to Revoke

24. Whitely's Petition to Revoke [23] alleges misrepresentations to the Commission and abandonment of station WWOR-TV's obligation to be responsive to

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[22] In the unlikely event that Newco does not operate as represented, we have ample enforcement powers to cure violations.

[23] Petitions to revoke are treated as informal requests for Commission action under section 1.41 of the Commission's rules. See MCI Telecommunications Corp., 3 F.C.C. Rcd. 509 at n. 1, supplemented, 4 F.C.C. Rcd. 7299 (1988), dismissed by judgment sub nom. TeleStar, Inc. v. F.C.C., No. 88-1153 (D.C. Cir. May 1, 1990). Initiation of revocation proceedings under section 312(a) "is, of course, wholly subject to our discretion," id. 3 F.C.C. Rcd. at 513, citing Tulsa Cable Television, 68 F.C.C. 2d 869, 877 (1978). In any event, even if section 309(d)(1) applied, no prima facie case based on specific factual allegations, has been made.

the issues confronting Secaucus and northern New Jersey. Whitely states that counsel for MCA made a material misrepresentation in a letter of December 5, 1990. That letter states, among other things, that the shareholders of record of MCA would continue to hold total uninterrupted control over the station after the spin-off to Newco. That position contains a material misrepresentation, in Whitely's view, because: (1) current shareholders with fewer than five MCA shares, because of the five-to-one conversion ratio, will not receive Newco stock, but will instead receive cash; (2) MCA debenture holders may convert their debentures to MCA common stock, which would introduce new shareholders; and (3) Matsushita holds an option to buy MCA shares if certain events occur, which would introduce another substantial shareholder. These subjects are discussed above in footnotes 8 and 11. We are disinclined to find misrepresentations in a page and one-half letter that describes a transaction whose contracts and offerings are more easily described in inches of thickness than in pages. A short letter cannot possible contain all of the qualifications that are a necessary part of such a substantial transaction. In any event, we have repeatedly stated that a necessary element of a misrepresentation to the Commission is an intent to deceive. See, e.g., Fox River Broadcasting, Inc., 93 F.C.C.2d 127 (1983). We do not infer an intent to deceive when an applicant has disclosed information on the public record, here at the SEC, particularly where: (1) the applicant made specific reference to that material in its filings with us; (2) it would be correctly assumed that the material would be available to us; and (3) the material referred to does not affect our decision. We conclude that Whitely has failed to allege facts, that, on their face, establish a misrepresentation to us.

25. The alleged abandonment of the station's New Jersey programming obligation is evidenced, in Whitely's opinion, by a shift to the use of promotional names of "Universal 9" and "Universal," and an alleged abandonment of references to Secaucus. These allegations are not supported by an affidavit from a person with first-hand knowledge of the facts. In addition, we have addressed a similar allegation at the time MCA acquired station WWOR-TV. RKO General, Inc., 1 F.C.C. Rcd. 1081 (1986). We discussed in detail the standard to be applied to the station's programming obligations to Secaucus and northern New Jersey. Id. at 1086-88. At the heart of a petitioner's showing is an obligation to demonstrate that a station is failing to address issues facing the community, based on the licensee's issues/programs list, which is placed in the station's public inspection file on a quarterly basis. Id. at 1087. Here, Whitely has made no reference to the issues/programs list and has identified no issues whatsoever that it believes that the station should have addressed. Whitely has not, therefore, alleged facts relevant to our determination in this regard, and we shall deny its Petition to Revoke.

Conclusion

26. We find that the applicants are fully qualified and that a grant of the application would serve the public interest. Our action, however, is only permissive and does not compel the transaction to go forward. It is the MCA shareholders who will ultimately evaluate the benefits and detriments of the proposed tender offer and approve or disapprove the transaction by tendering or withholding their shares.

27. Accordingly, IT IS ORDERED That the petitions of Garden State Broadcasting Limited Partnership and Whitely Communications ARE DISMISSED and, when considered as informal objections, ARE DENIED.

28. IT IS FURTHER ORDERED, That the informal objection of Michael Krauss IS DENIED.

29. IT IS FURTHER ORDERED, That the Petition for Stay filed by Whitely Communications IS DENIED.

30. IT IS FURTHER ORDERED, That the Petition to Revoke filed by Whitely Communications IS DENIED.

31. IT IS FURTHER ORDERED, That the application (BTCCT-901127KE) of MCA, Inc., to transfer control of MCA Broadcasting, Inc. to Newco, Inc., IS GRANTED subject to the condition that Messrs. Baker, Samuel and Smith either resign their positions with MCA, Inc., or with MCA Broadcasting, Inc., and WWOR-TV, Inc., within 90 days of the date of closing of the transfer of control.

32. The staff of the Mass Media Bureau is directed to send copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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